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No. 89-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES P. LEHNERT, *et al.*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND J. LAJEUNESSE, JR.*
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

January 1990

QUESTIONS PRESENTED

Do the first and fourteenth amendments to the United States Constitution permit a public employer to compel objecting nonunion public employees to contribute, as a condition of their employment, to the costs of the following activities engaged in by their exclusive bargaining representative and its state and national affiliates:

a) activities on behalf of persons not in the employees' bargaining unit, including employees in other states and different professions, and retirees;

b) lobbying at state and federal levels on measures not for ratification of, or authorization or appropriation of funds for, the bargaining agreement covering the employees' bargaining unit;

c) electoral politics, including campaigns concerning ballot issues;

d) public relations activities;

e) non-bargaining activities related only generally to the employees' profession;

f) meetings of the affiliates that primarily serve political and ideological purposes; and,

g) threatening and preparing for illegal strikes.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

Petitioners: Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman. Each of said parties joins in this petition.

Respondents: Michigan Education Association; National Education Association of the United States; the Board of Control of Ferris State College; Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, members of the Board of Control of Ferris State College, in their official capacities; Robert L. Ewigleben, President of Ferris State College, in his official capacity; S. Eugene Bychinsky, Vice President, Personnel, of Ferris State College, in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners James P. Lehnert, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on August 14, 1989.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Appendix ("App.") A, *infra*, 1a, 13a) are reported at 881 F.2d 1388. The opinion and judgment order of the United States District Court for the Western District of Michigan are reported at 643 F. Supp. 1306 (App. B, *infra*, 18a, 77a); its opinion denying a motion for partial new trial

and to alter or amend the judgment (App. C, *infra*, 81a) is reported at 685 F. Supp. 164.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1989. On September 19, 1989, the court of appeals granted petitioners leave to file a petition for rehearing one day out of time, *i.e.*, on August 29, 1989, when that court received it (App. E, *infra*, 89a). The petition for rehearing was denied on November 7, 1989 (App. F, *infra*, 90a). The time for petitioning for certiorari runs from the latter date. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

[1]Earlier opinions of the district court not necessary to ascertaining the grounds of the judgment sought to be reviewed, the basis for federal or appellate jurisdiction, or to reviewing the questions presented are reported at 556 F. Supp. 309 (denying motions to dismiss and for abstention and summary judgment) and 556 F. Supp. 316 (denying motion for protective order).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statutes involved are the Michigan Public Employment Relations Act ("PERA"), Mich. Comp. Laws §§ 423.201-.216 (1979), and Michigan Compiled Laws § 408.477 (1979). Their pertinent provisions are reprinted, respectively, in Appendix G, *infra*, 92a, and H, *infra*, 95a.

STATEMENT OF THE CASE

Petitioners are six present or former faculty members employed by Ferris State College ("Ferris"), a four-year public institution of higher learning in Michigan. Although not union members, they are or were employed in a bargaining unit, consisting only of faculty at Ferris, represented exclusively for purposes of collective bargaining by a union, the Ferris Faculty Association ("FFA"). App. A at 1a-2a.

The FFA, which represents only the one unit, is affiliated with the Michigan ("MEA") and National ("NEA") Education Associations. Under an "agency shop" provision in the collective bargaining agreements in effect since 1981, as authorized by the PERA, Mich. Comp. Laws § 423.210 (App. G at 92a-93a), and Michigan Compiled Laws § 408.477 (App. H at 95a), Ferris automatically deducted from the pay of nonmembers a "service fee" equal to the dues of members of the FFA, MEA, and NEA, "less any amounts not permitted by law." App. B at 19a-23a & n.3.

The MEA and NEA have other local affiliates which represent employees elsewhere in Michigan and other states, including states where public-sector bargaining is not permitted. Some locals represent faculty at other higher education institutions; but most represent teachers in public elementary, intermediate, or high schools ("K-12"). Others represent faculty or teachers in private or parochial education, and yet others represent educational support personnel (*e.g.*, school secretaries) in the various types of institutions. The MEA and NEA are "highly politicized organization[s], active in causes both related and unrelated to collective bargaining, contract administration and grievance adjustment." *Id.* at 32a, 39a-40a.

On the authority of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the nonmembers objected to the exaction of service fees for any purposes other than the performance of the FFA's duties as exclusive representative of the Ferris unit. App. B at 25a. They brought this civil rights action under, *inter alia*, 42 U.S.C. § 1983, claiming that the freedoms of speech, thought, conscience, assembly, petition, and association secured to them by the first and fourteenth amendments are violated to the extent that the fee includes the costs of such other activities. Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343 (1982). In addition to the FFA, MEA, and NEA ("the unions"), the governing Board of Control of Ferris, its members and two officers of Ferris, in their official capacity, were named as defendants. App. B at 18a-20a.[2]

In pre-trial proceedings, the parties agreed that the issue of which union expenditures constitutionally are chargeable to objecting nonmembers would be tried only

[2]Pursuant to stipulation and order, only injunctive relief was sought against the nonunion defendants. App. B at 19a.

with regard to the unions' fiscal year 1981-82. A portion of the fees demanded of plaintiffs for that year was put in escrow. App. B at 23a-24a. After a twelve-day bench trial at which the court heard twelve witnesses and admitted ninety exhibits, judgment was entered for the employees. *Id.* at 19a, 77a-78a.

The district court held that certain union expenditures were chargeable, others were not as a matter of law, and yet others were not because the unions did not meet their burden of proof. *Id.* at 44a-66a. In addition, the unions' procedures for collecting service fees were declared unconstitutional under the standards set out in *Teachers Local 1 v. Hudson*, 475 U. S. 292 (1986). App. B at 66a-75a. The judgment enjoined deduction of fees until further order, required restitution of most of the employees' escrowed funds, and ordered that the unions were entitled to specified amounts for 1981-82. *Id.* at 77a-78a.

A motion for partial new trial and to alter or amend the judgment filed by the unions was denied. App. D, 87a. They noticed appeal, and the employees filed a timely cross-appeal. After a partial settlement agreement, the unions dismissed their appeal; the cross-appeal was limited to the contention that the district court erred in concluding that the costs of certain activities were constitutionally chargeable to objecting nonmembers. App. A at 3a. The challenged activities included: (1) activities on behalf of persons not employed in the FFA's bargaining unit; (2) lobbying; (3) electoral politics; (4) public relations; (5) professional/educational activities; (6) conventions of the MEA and NEA and meetings of another level of the unions' structure, the 13E Coordinating Council ("13E"); and (7) preparations for illegal strikes. *Id.* at 5a-12a.

The court of appeals affirmed. *Id.* at 13a. Judge Merritt concurred in the holding that the costs of the

MEA and NEA conventions and 13E meetings are constitutionally chargeable. However, he vigorously dissented with regard to the other disputed activities. *Id.* at 13a-17a. Because less than a majority of all active judges of the court of appeals favored the suggestion, a petition for rehearing and suggestion of en banc consideration was referred to the original panel. It denied rehearing. App. F, 90a.

REASONS FOR GRANTING THE WRIT

I. ALTHOUGH THIS COURT HAS NOT DETERMINED THE PRECISE QUESTIONS PRESENTED, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S APPLICABLE PRECEDENTS, WHICH NARROWLY LIMIT THE PURPOSES FOR WHICH COMPULSORY FEES LAWFULLY MAY BE COLLECTED

Abood, 431 U.S. at 232, 235-36, held that the first amendment prohibits a union from using an objecting nonmember's agency-shop fees "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative," *i.e.*, for other than "collective-bargaining, contract administration, and grievance-adjustment purposes." Because of the case's posture, *Abood* did not further define what, and where, union activities can constitutionally be financed from dissenters' service fees. *Id.* at 236-37.

This case presents those "difficult constitutional questions," *id.* at 237 n.34, which the Court has not yet more specifically addressed in a public-sector context. However, two related decisions, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and *Hudson*, establish that chargeable

costs must be defined narrowly in the public sector, because the coerced collection of service fees, even for bargaining, is "a significant impingement on First Amendment rights," *Ellis*, 466 U.S. at 455; *accord Hudson*, 475 U.S. at 301 & n.8, 307 n.20.

Ellis determined what financial obligations an exclusive representative may impose upon nonmembers under the first amendment and § 2, Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh (1982). While based partly on statutory construction, *Ellis* has constitutional underpinnings. *See Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring). In *Ellis*, 466 U.S. at 441, the Ninth Circuit reasoned that, if "activities ultimately benefited the union's collective-bargaining efforts, the union was free to finance them with dues collected from objecting employees." This Court rejected that amorphous standard and narrowly defined chargeable activities "to avoid the constitutional difficulty" raised by the argument that the union's use of dissenters' fees for certain disputed purposes violated the first amendment. *Id.* at 444-48, 451-53.

This case differs from *Ellis* only in two respects. First, the rights violated here are wholly constitutional, not statutory, because the Michigan agency-shop statute, Mich. Comp. Laws § 423.210(10)(1)(c), (2), "'sanctions the use of nonunion members' fees for purposes other than collective bargaining.'" *Abood*, 431 U.S. at 232 (quoting *id.*, 60 Mich. App. 92, 99, 230 N.W.2d 322, 326, *appeal denied*, 395 Mich. 755 (1975)). As the Court said in *Abood*, 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case." Second, although this is a public- rather than private-sector case, the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. Thus, although "in the public sector the line may be somewhat hazier" between activities

"for which contributions may be compelled" and those "for which such compulsion is prohibited," *id.* at 236, compulsion still is prohibited by the first amendment unless a disputed activity directly serves the governmental interest that the agency shop is thought to advance.

Any prior doubt that normal first-amendment strict scrutiny is necessary in defining constitutionally chargeable costs under a public-sector agency-shop arrangement was dispelled by *Hudson*. Because *Hudson* concerned the procedures for collection of service fees, it did not further delineate "'the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters.'" *Hudson*, 475 U.S. at 294, 304 n.13 (quoting *Ellis*, 466 U.S. at 447). Nonetheless, *Hudson* has significance in drawing that line.

In *Hudson*, 475 U.S. at 302-03 & n.11 (footnote omitted), the Court relied on *Roberts*, 468 U.S. at 623 (which cited *Abood*), *Elrod v. Burns*, 427 U.S. 347, 363 (1976), and earlier statements of the strict-scrutiny test for the conclusion that,

> although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure [for determining chargeable costs] be carefully tailored to minimize the infringement.

Because the substantive legal standard for determining chargeable costs is even more important to that determination than the procedure, there is even greater reason to tailor carefully and narrowly apply the definition. Unfortunately, although the majority below recognized that the *Ellis* test is applicable here, App. A at 4a, it ignored *Hudson*'s command of strict scrutiny in interpreting and

applying it. Consequently, as Judge Merritt pointed out, the majority "significantly expand[ed] *Ellis* without justification and without serious attention to the protections of the First Amendment." *Id.* at 14a (dissenting).

A. THE PANEL MAJORITY PLACED NO PRACTICAL LIMITS ON A UNION'S ABILITY TO FORCE OBJECTING NONMEMBERS TO SUBSIDIZE ITS SPEECH AND ASSOCIATIONAL ACTIVITIES

Under the rulings below, in calculating a service fee public-sector unions may ignore the bargaining unit and the statutory definition of their duties as a nonmember's exclusive representative. The panel majority's decision permits unions to charge a nonmember for their activities, including political and ideological activities, as long as the activities appear to advance some employment-related interest of employees (or former employees) they represent somewhere. *Id.* at 5a-12a. Because a union presumably intends everything that it does to advance some employment-related interest of some employees it represents, the practical effect is to leave no geographic or functional limit on the collection of compulsory union fees from objecting public employees. That decision rests on four erroneous premises which are directly contrary to the applicable decisions of this Court.

First, the majority interpreted *Ellis* as holding that "union expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative were chargeable to dissenting employees," "even if the chargeable activities * * * were *unrelated* to the specific bargaining unit of the dissenting employees." *Id.* at 10a. The majority did not quote language so holding in *Ellis*, because *Ellis* actually held

precisely the opposite, as Judge Merritt recognized *Id.* at 13a-16a (dissenting).

The specific issue in *Ellis* was whether certain categories of union expenditures were lawfully chargeable to objecting nonmembers under the RLA and the first amendment. The Court began its analysis by stating the *raison d'etre* for any constitutionally valid compulsory unionism provision: the "essential justification for authorizing the union shop was the desire to eliminate free riders—employees *in the bargaining unit* on whose behalf the union was *obliged to perform its statutory functions*." *Ellis*, 466 U.S. at 447 (emphasis added); *accord Abood*, 431 U.S. at 221-24.

By definition, an exclusive representative owes no statutory obligation to employees in one unit to represent employees in any other. *See Ellis*, 466 U.S. at 451-53.[3] Therefore, as Judge Merritt said,

> Applying the Railway Labor Act in light of First Amendment principles, * * * the Court determined that Congress did not authorize the charging of expenditures that were not related to "the duties of [the Union as] an exclusive representative *of the employees* in dealing with *the employer*." The Supreme Court insisted that an expenditure must be for "activities normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative *of the employees in the bargaining unit*."

App. A at 14a (dissenting) (citation omitted) (quoting *Ellis*, 466 U.S. at 448).

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[3]That is as true under the PERA as it is under the RLA: "Representatives designated or selected for purposes of collective bargaining by the majority of the public employees *in a unit* appropriate for such purposes, shall be the exclusive representatives of all the public employees *in such unit* for the purposes of collective bargaining * * * ." Mich. Comp. Laws § 423.211 (emphasis added) (App. G at 93a).

In considering two of the expense categories challenged in *Ellis*, "organizing" and "litigation," the Court explicitly and emphatically used that bargaining-unit limitation. Organizing expenses are not chargeable, because they "are spent on employees outside the collective-bargaining unit already represented." *Ellis*, 466 U.S. at 452.[4] And, "unless the [employees'] bargaining unit is directly concerned, objecting employees need not share the costs of the union's [litigation]." *Id.* at 453. The panel majority ignored those holdings of *Ellis*, citing instead its rulings concerning the union's national convention and publication. *See* App. A at 10a-11a. However, the latter rulings also are fully consistent with a bargaining-unit limitation.

The convention was chargeable in *Ellis*, because it was an institutional expense "essential to the union's discharge of its duties as bargaining agent" for the dissenters' unit. *Ellis*, 466 U.S. at 448-49.[5] And, contrary to the panel

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[4]That *Ellis*, 466 U.S. at 452 n.13, also disallowed organizing within the unit on another ground does not vitiate the importance of its *rationale* for holding that organizing outside the unit is not chargeable.

[5]The court of appeals found that holding dispositive as to the chargeability of the MEA and NEA conventions and the 13E meetings. App. A at 6a; *see id.* at 13a (Merritt, J., concurring in part). However, the convention in *Ellis*, 466 U.S. at 448-49, was held only once every four years to maintain the exclusive representative's "corporate or associational existence," "elect officers to manage and carry on its affairs," and "establish bargaining goals and priorities," and the costs of any political activities that occurred at it apparently were "'deducted from [the dues of] objecting employees,'" *id.* at 459 n.1 (Powell, J., dissenting in part) (quoting Brief for Respondents at 29 n.16, *Ellis* (No. 82-1150)). It is a far cry from such a necessary convention of the bargaining agent itself, with only an incidental political component, to *three* conventions and several other meetings held *every* year by *affiliates* of the agent for *primarily* political and ideological purposes. If certiorari is granted, we will demonstrate those distinguishing facts from the record. The [note cont'd on p. 12]

majority's statement, *Ellis* did not hold that the costs of a union publication are chargeable "insofar as the publication reported on activities chargeable to dissenters, even if the chargeable activities reported on were *unrelated* to the specific bargaining unit of the dissenting employees," App. A at 10a. *Ellis*, 466 U.S. at 451 & n.11 (emphasis added), held only that the union could "charge objecting employees for reporting to them about those activities it can charge *them* for doing," *not* for reporting about activities for which it "cannot spend dissenters' funds," including organizing and litigation not directly concerning their bargaining unit. In short, the bargaining-unit limitation applied to publications.

Second, the panel majority conceded that "it is clear * * * that dissenting employees in the private sector may not be charged for political or ideological union activities." App. A at 7a. It nonetheless held that "union lobbying to obtain funds for public education generally * * * and other similar political activities," including "millage and ballot campaigns," are chargeable, even if *un*related to the Ferris unit, because there "are, as noted * * * in *Abood*, fundamental differences between collective bargaining in the public sector and in the private sector." *Id.* at 7a-10a. However, the majority's holding does not follow from and is, indeed, contrary to *Abood*.

Abood, 431 U.S. at 232 (emphasis added), held that the "differences between public- and private-sector collective bargaining simply *do not translate into differences in First Amendment rights*." It was precisely *because* "Michigan law also permits union expenditures for *legislative lobbying* and in support of political candidates," which the

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Court should grant certiorari to clarify that *Ellis* does not permit unions to require objecting nonmembers to subsidize their political rallies by conducting some incidental administrative business at them and calling them "conventions."

Court characterized as "political and ideological purposes unrelated to collective bargaining," *id.* at 215, 232-33 & n.29 (emphasis added), that *Abood* invalidated on first-amendment grounds Michigan's authorization of the use of fees collected from objecting employees for such purposes. *Id.* at 232-36.

Only in *dicta* did the Court speculate that a narrow class of lobbying might be chargeable in the public sector: "The process of establishing *a written collective-bargaining agreement* * * * may require not merely concord at the bargaining table, but subsequent approval by other public authorities; *related* budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Abood*, 431 U.S. at 236 (emphasis added). Even there, as Judge Merritt explained, that "entire section from *Abood* makes clear that it is the relation of the challenged activity to the bargaining unit which is crucial." App. A at 13a (dissenting).

Third, the panel majority viewed lobbying and other political activities to obtain funding for public education generally as necessary to the duties of a bargaining agent representing educational employees, and "closely connected" to the terms and conditions of employment of such employees. *Id.* at 7a-10a. That is not true in fact, and is contrary to *Pickering v. Board of Education*, 391 U.S. 563 (1968), as a matter of law.

In fact, no provision of the PERA, Mich. Comp. Laws §§ 423.201-.216, imposes a duty on an exclusive representative to advance employees' "interests in legislative and other 'political' arenas," as the majority erroneously assumed, App. A at 7a. In those arenas, the union acts as a voluntary association representing its members, not as a statutory bargaining agent speaking on behalf of all employees in the unit. As a matter of constitutional law, *Pickering*, 391 U.S. at 571-74 (emphasis added), held that

"the question whether a school system requires additional funds" is a matter of public concern "in which the fact of employment *is only tangentially and insubstantially involved*," a relationship the Court saw as too remote to justify infringing first-amendment rights.[6]

Fourth, because it viewed the expenditures as *de minimis*, the panel majority allowed the nonmembers to be charged for certain political and ideological activities that were completely unrelated to bargaining, and professional and public relations activities that it conceded "may not be 'central' to collective bargaining." The majority analogized those expenditures to the *de minimis* expenditures for union social activities held chargeable in *Ellis*, 466 U.S. at 449-50. App. at 10a n.1, 12a. The analogy fails.

First-amendment interests were implicated by the social activities at issue in *Ellis*, 466 U.S. at 456, only "from the union's involvement" in them. Here, however, political and ideological, professional/educational (*e.g.*, curriculum development), and public relations activities inherently implicate significant first-amendment interests beyond the mere fact that they are union activities, as Judge Merritt recognized. *See* App. A at 15a-16a (dissenting). Therefore, the panel majority's holding is contrary to the explicit command of *Hudson*, 475 U.S. at 305, that

[6]As to funding of public education, "it is necessary to regard the teacher as the member of the general public that he seeks to be." *Pickering*, 391 U.S. at 574. Moreover, many of the lobbying and campaign efforts of the unions here were for taxes (including millages), appropriations, and programs for K-12 education only, not even for higher education in general, much less Ferris in particular. Since K-12 and higher education are competitors for scarce public funds, the panel majority thus compels nonmembers to subsidize speech and petition on controversial matters of public concern that are not only against their interests as taxpayers, but also as faculty members. *See, e.g.*, Samuelson, *Back-to-School Economics*, Newsweek, Sept. 23, 1985, at 53.

"whatever the amount, the quality of [nonmembers'] interest in not being compelled to subsidize the propagation of political and ideological views that they oppose is clear." The first amendment does not permit government to "forc[e] an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Id.* at 305-06 & n.15.[7]

B. THE PANEL MAJORITY'S DECISION ENCOURAGES UNIONS TO THREATEN AND PREPARE FOR UNLAWFUL ACTIVITY, AT THE EXPENSE OF LAW-ABIDING NONUNION EMPLOYEES

The panel majority ruled that objecting nonmembers can "be charged for union expenditures made in publicizing, preparing for and threatening a strike that would be illegal under Michigan law[, b]ecause the union did not actually engage in an illegal strike," and because those preparations and threats were designed "to put pressure on Ferris." App. A at 11a-12a. There is no question that the union could not spend objecting nonmembers' compulsory fees for engaging in an illegal strike, as a matter of Michigan law. *Male v. Grand Rapids Educ. Ass'n*, 98 Mich. App. 742, 295 N.W.2d 918 (1980), *appeal denied*, 412 Mich. 851 (1981). Thus, the majority's ruling is contrary to

[7]More than three pence is at stake, of course. At issue are the costs of those portions of the MEA's primary publication categorized as "Public Relations" and "Other Material" and considered chargeable by the district court, which constituted 27.1% of its total column inches and, thus, equaled $68,859 of the $254,092 expended on it in 1981-82. That is 0.4% of the MEA's total direct expenditures for the year, and 0.4% of an individual nonmember's MEA service fee of $201.20 is $0.80. *See* App. B at 63a-64a, 80a. Moreover, the unions had other substantial expenses for public relations and professional activities that were not allowed only because they were not adequately identified and quantified. *See id.* at 33a-34a, 41a-42a, 62a-66a. In future years, those expenses also could be charged based on the precedent of the majority's holding.

Ellis, 466 U.S. at 451, which held: "If the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing [or talking] about that activity."

Judge Merritt correctly analyzed the implications of the majority's decision on this point: "If the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts." App. A at 16a (dissenting).

The Court can take judicial notice that illegal, even violent and criminal, acts sometimes occur, and more often are threatened, in labor relations. *See, e.g.*, A. Thieblot & T. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (Labor Relations & Public Policy Series No. 25, 1983). However, that illegal acts are commonly planned and threatened as "bargaining tools" in legal negotiations gives government no compelling interest in requiring nonmembers to subsidize such conspiracies and extortionate speech. The state's only interest in this context is in preventing such subsidization, not in sanctioning it and thus encouraging the illegal activity. *See Male*, 98 Mich. App. at 750, 295 N.W.2d a. 920. Therefore, "[t]o permit a * * * union to force dissenters to finance [threats and preparation for] unlawful acts * * * is no small First Amendment violation." App. A at 16a-17a (Merritt, J., dissenting).

II. THE FIRST-AMENDMENT QUESTIONS PRESENTED SHOULD BE SETTLED BY THIS COURT, BECAUSE OF THEIR EXCEPTIONAL IMPORTANCE AND THE CONFUSION OF THE COURTS OF APPEALS AS TO THEIR RESOLUTION

This is a case of great moment involving individual freedoms and the right of public employees to work without compulsion to support financially union political and ideological activism which, at best, is only tenuously related to a union's statutory duties in representing them in labor-management relations with their employer. Its fundamental importance is shown by the number of times in recent years that this Court granted review in cases presenting similar or related constitutional and statutory questions concerning compulsory union fee arrangements. *E.g., Communications Workers v. Beck*, 487 U.S. ___, 108 S. Ct. 2641 (1988); *Hudson*; *Ellis*; *Abood*; *cf. Keller v. State Bar*, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542, *cert. granted*, 110 S. Ct. 46 (1989) (purposes for which compulsory bar dues may constitutionally be used).

The exceptional importance of the questions presented is due not only to the fundamental nature of the individual first-amendment rights at stake, but also to the large numbers of public employees in many states subject to agency-shop requirements.[8] Thus, if allowed to stand, the panel majority's broad interpretation of the purposes for which coerced union fees may constitutionally be spent could result in widespread distortion of the political and legislative processes. "Conditioning public employment on partisan support prevents support of competing political interests." *Elrod*, 427 U.S. at 356. "Given the increasingly

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[8] As of 1984, compulsory unionism provisions for public employees were statutorily authorized in some twenty states. *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1727 & nn. 9-12 (1984).

pervasive character of government employment, * * * the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant [distorting] impact on the formation and expression of political beliefs." *Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980).

In *Hudson*, 475 U.S. at 300, the Court granted certiorari due to "the divergent approaches of other courts to the issue" of the constitutionality of procedures for drawing the line between union activities that are chargeable or not to nonunion public employees. A similar divergence of approaches, if not direct conflict, exists among the courts of appeals on the even more fundamental question of where that line should be drawn.

The majority's decision in this case as to activities outside the bargaining unit stands in stark contrast to the holding of another panel of the Sixth Circuit that a union "may collect *only for those expenses affirmatively related to the bargaining agreement* because these constitute the only expenditures that, consistent with the First and Fourteenth Amendments under *Abood* and *Hudson*, the union may collect to prevent non-members' 'free riding.'" *Tierney v. City of Toledo*, 824 F.2d 1497, 1505 (6th Cir. 1987). It also conflicts with the ruling of the Seventh Circuit in *Hudson v. Teachers Local 1*, 743 F.2d 1187, 1193 (7th Cir. 1984) (emphasis added), *aff'd on other grounds*, 475 U.S. 292 (1986),[9] that

[9]This Court and one judge on the Seventh Circuit's panel found it unnecessary to reach any question of what activities are constitutionally nonchargeable. *Hudson*, 475 U.S. at 304 n.13; *id.*, 743 F.2d at 1197-98 (Flaum, J., concurring in the result).

> the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go *no further than is necessary* to prevent the individual from taking a free ride on an entity that (whether or not he wants to support it) is providing *services to him as his collective bargaining representative.*

Ignoring *Tierney* and *Hudson*, the panel majority relied on *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989), for its ruling that expenditures need not be related to the dissenter's bargaining unit to be chargeable. App. A at 11a. However, *Crawford* itself demonstrates the importance and unsettled state of this issue, despite the clear mandates of this Court's decisions in *Abood*, *Ellis*, and *Hudson*. The Fourth Circuit had already granted rehearing en banc in *Crawford*, 870 F.2d at 155 (argued en banc Oct. 3, 1989), thus vacating the panel judgment and opinion under Fourth Circuit Rule 35(c), before this case was decided.

Also, the majority here agreed with the decision in *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), that lobbying and other political activities affecting employment-related matters not subject to bargaining can be charged to objecting nonmembers. App. A at 7a.[10] In contrast, the Fourth Circuit in

[10]The majority also relied on *Knight v. Minnesota Community College Faculty Association*, 571 F. Supp. 1 (D. Minn. 1982) (3-judge court), *aff'd mem.*, 460 U.S. 1048 (1983), and *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985). However, those cases are distinguishable, at least in part, because in both negotiated agreements and contract administration were directly subject to action by the state legislature. *Champion*, 738 F.2d at 1086; *Knight*, 571 F. Supp. at 3-4. Thus, unlike this one, *Knight* and *Champion* were cases in which the "process of establishing a written collective-bargaining agreement * * * require[d] not merely concord at the bargaining table, but subsequent **[note continued on page 20]**

Beck v. Communications Workers, 776 F.2d 1187, 1211 n.31 (1985) (dictum), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. ___, 108 S. Ct. 2641 (1988), said that it "is not easy to reconcile this decision [in *Robinson*] with *Abood*." *See also Beck*, 776 F.2d at 1206 (interpreting *Abood* as holding that service fees may not be collected for "political or lobbying purposes").

This case is particularly suited to ending the lower courts' confusion on the important questions that it presents. As a result of a twelve-day trial, there is a fully developed record about the disputed activities, consisting of the testimony of twelve witnesses and ninety exhibits. App. B at 19a. The case thus provides the "factual concreteness" as to the nature of union activities that *Abood*, 431 U.S. at 236-37 & nn.33-34, saw as necessary to resolving the "difficult constitutional questions" inherent in determining which activities are chargeable.

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approval by other public authorities" and "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236 (dictum). In addition, this Court's summary affirmance in *Knight* is not dispositive here, because *Knight*, 571 F. Supp. at 6, concerned only the constitutionality of public-sector exclusive representation; "[c]alculation of the fair share fee [wa]s not in dispute." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 175-77 (1977).

CONCLUSION

In a free society, government-sanctioned restrictions on freedom of speech, association, and petition must be narrowly drawn to minimize the infringement on individual rights. *Hudson*, 475 U.S. at 302-03 & nn.11-12; *Elrod*, 427 U.S. at 362-63. The panel majority's expansive construction of the scope of union activities which individuals may be compelled to subsidize as a condition of public employment repudiates that fundamental tenet of first-amendment law. An erroneous precedent thus has been set which misapplies the applicable decisions of this Court and exacerbates the confusion of the courts of appeals on questions which the Court has not explicitly determined in a public-sector case. The petition for certiorari should be granted.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Rd., Suite 600
Springfield, Virginia 22160

Counsel of Record for Petitioners

January 1990

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

August 14, 1989

James P. LEHNERT, Elmer S. Junker, James Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman,

Plaintiffs-Appellants,

v.

The FERRIS FACULTY ASSOCIATION, Michigan Education Association, and National Education Association of the United States,

Defendants-Appellees.

No. 87-1700.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 20, 1988.

Decided Aug. 14, 1989.

Before MERRITT, MARTIN, and MILBURN, Circuit Judges.

BOYCE F. MARTIN, Jr., Circuit Judge.

The plaintiffs, six faculty members at Ferris State College, appeal the judgment of the district court in this § 1983 civil rights action, claiming that the collection and use of service fees as an agency shop violated their rights under the first and fourteenth amendments. We affirm the judgment of the district court.

I.

Since 1975, the Ferris Faculty Association, an affiliate of the Michigan Education Association and the National Education Association, has been recognized under the Michigan Public Employment Relations Act, Mich.Comp.Laws § 423.211, as the exclusive bargaining representative for the faculty of Ferris State College, a four-year public institution of higher learning in Michigan. During the 1981-82 membership year, which is the only relevant year for the purposes of this appeal, the plaintiff faculty members were included in the bargaining unit represented by the Ferris Faculty Association, but did *not* become members of the Association. The collective bargaining agreement in effect during 1981-82 included a service fee provision that required all employees in the bargaining unit who did not belong to the Ferris Faculty Association to pay a service fee equivalent to the amount of dues required of members of the Association. Of the $284.00 service fee required in 1981-82, $24.80 was paid to the Ferris Faculty Association, $211.20 went to the Michigan Education Association, and $48.00 was collected by the National Education Association. Under the unified structure of the unions, membership in the Ferris Faculty Association constituted membership in the Michigan Education Association and the National Education Association as well; consequently, the mandatory service fees paid by nonmembers such as the six plaintiffs were divided among the three affiliated unions. The plaintiff faculty members objected to the use by the unions of their service fees for purposes other than negotiating and administering a collective bargaining agreement with the Ferris Board of Control, the governing body of Ferris State College, and they filed a civil rights action under 42 U.S.C. §§ 1983, 1985 and 1986 against the Ferris Board of Control, the Ferris Faculty Association, the Michigan Education Association and the National Education Association. In their complaint, the plaintiffs alleged that

the unions' use of their mandatory service fees to engage in certain activities, including lobbying and political campaigning, violated their rights under the first and fourteenth amendments.

A trial before the court was held in January and April of 1986. On August 25, 1986, the district court issued its opinion, holding that certain union expenditures were chargeable to the plaintiffs, that other expenditures were not chargeable as a matter of law, and that other expenditures were not chargeable because the unions failed to sustain their burden of proving the expenditures were made for chargeable activities. *Lehnert v. Ferris Faculty Association-MEA-NEA*, 643 F.Supp. 1306 (W.D.Mich.1986). Following a settlement agreement between the parties, this appeal is limited to the claim that the district court erred in holding that the costs of certain disputed union activities were constitutionally chargeable to the plaintiff faculty members.

II.

Before addressing the union activities specifically objected to by plaintiffs, we begin our analysis by surveying the Supreme Court decisions that plaintiffs and defendants both agree must govern our resolution of this appeal. The Court initially addressed first amendment questions in the union shop context in a series of cases brought under the Railway Labor Act. In *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Court held that the Railway Labor Act, which authorized employers and labor organizations acting as exclusive representatives of bargaining units to enter into union shop agreements, did not violate the Constitution. Several years later in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court held that the Railway Labor Act did not

allow a union, even in a closed shop, to expend union funds to support political causes over the objection of dissenting union members. The Court noted that political uses of funds by a union were not uses that helped defray the expenses of negotiating and administering collective agreements or the expenses of adjusting grievances and disputes. *Street*, 367 U.S. at 768, 81 S.Ct. at 1799. Similarly, in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 121, 83 S.Ct. 1158, 1163, 10 L.Ed.2d 235 (1963), the Court characterized the union expenditures that could be charged to dissenting employees as only those "germane to collective bargaining." Most recently, in *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court delineated the line between chargeable and nonchargeable union expenditures under the Railway Labor Act. Specifically, the Court stated that

> the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

466 U.S. at 448, 104 S.Ct. at 1892.

Although the Supreme Court has, as we discussed, decided several cases concerning the union shop in the private sector, the Court has considered the constitutionality of the union shop in the public sector only once. In *Abood v. Detroit Board of Education*, 431 U.S.

209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court found the same Michigan statute at issue in this case to be constitutional, thereby approving the union or agency shop in the public sector. The Court noted, however, that the line between collective bargaining, contract administration or grievance adjustment activities, for which contributions from dissenting employees may be compelled, and ideological or political activities, for which such compulsion is prohibited, may be "somewhat hazier" in the public sector. Because the process of establishing a collective-bargaining agreement in the public sector requires not only "concord at the bargaining table, but subsequent approval by other public authorities," budgetary and appropriations decisions could be regarded as an "integral part of the bargaining process" for public employees. 431 U.S. at 236, 97 S.Ct. at 1800. In *Abood*, the Court remarked that it had "no occasion" to attempt to define the hazy dividing line between chargeable and nonchargeable union expenditures in the public sector, but we must, with guidance from *Hanson*, *Street*, *Allen*, *Ellis* and *Abood*, attempt to draw such a line in resolving this appeal.

III.

The plaintiff faculty members contend on appeal that certain union activities were improperly found chargeable to them under the standards set forth in *Abood* and *Ellis*. The challenged union activities include expenditures for the costs of (1) conventions; (2) lobbying and union electoral campaigns; (3) activities on behalf of persons not employed in the plaintiffs' bargaining unit; (4) strike preparation and public relations activities; and (5) miscellaneous professional activities. We disagree with the plaintiffs' claim that the district court erred in holding these disputed expenditures to be chargeable to them.

The plaintiffs argue that union expenditures to send Ferris Faculty Association delegates to the Michigan

Education Association and the National Education Association conventions and to participate in the 13E Coordinating Council, another union structure, should not be chargeable to them. We do not agree. In *Ellis*, the Supreme Court found that the *entire* cost of the national union's convention was chargeable to employees, even though a portion of the convention was apparently "political" in nature. 466 U.S. at 459, 104 S.Ct. at 1898 (Powell, J., dissenting in part). The plaintiff faculty members attempt to distinguish *Ellis* on the ground that the conventions of the Michigan Education Association and the National Education Association (unlike the national convention at issue in *Ellis*) were those of affiliated parent unions rather than a convention of the actual exclusive bargaining representative of the plaintiffs. We are not convinced that this distinction amounts to more than a technical difference in union organization. In any event, the district court noted that the Michigan Employment Relations Commission, which has primary authority for construing the Michigan Public Employment Relations Act, has held that a dissenting employee may be charged for the cost of the Michigan Education Association and the National Education Association conventions under *Ellis* because the "union as affiliated is the exclusive representative." 643 F.Supp. at 1326. For these reasons, we affirm the district court's decision that, under *Ellis*, the objecting plaintiff faculty members may be fully charged for the costs of the union conventions. We affirm for similar reasons the district court's decision that funds spent by the Ferris Faculty Association to send representatives to the 13E Coordinating Council were chargeable, as the court specifically found that the Council developed bargaining strategies and representational policies for bargaining units, including Ferris State College, and the plaintiffs failed to show this finding by the district court to be clearly erroneous.

The plaintiffs also assert that union expenditures for legislative lobbying and for "millage" campaigns and other ballot issues were erroneously found chargeable to them. While it is clear, under *Street* and *Allen*, that dissenting employees in the private sector may not be charged for political or ideological union activities, we believe that the lobbying and other "political" activities of the union in this case were, as required by *Ellis*, "reasonably employed to implement or effectuate the duties" of the Ferris Faculty Association as the exclusive representative of the *public* employees at Ferris State College.

There are, as noted by the Supreme Court in *Abood*, fundamental differences between collective bargaining in the public sector and in the private sector. It cannot be disputed that governmental budgetary and appropriations decisions directly affect the terms and conditions of employment for public employees. To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other "political" arenas. We therefore agree with the opinion of the Third Circuit in *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985), and hold that lobbying and similar "political" activities by a public employee union that are "pertinent to the duties of the union as a bargaining representative" may be constitutionally charged to dissenting employees. 741 F.2d at 609. *Accord Knight v. Minnesota Community College Faculty Association*, 571 F.Supp. 1, 6-7 (D.Minn. 1982), *aff'd without opinion*, 460 U.S. 1048, 103 S.Ct. 1493, 75 L.Ed.2d 927 (1983) ("political" activities of the Minnesota Community College Faculty Association that were "related closely and directly to collective bargaining" were found constitutionally chargeable to objecting employees). *See also Champion v. State of California*, 738 F.2d 1082 (9th Cir.1984), *cert.*

denied, 469 U.S. 1229, 105 S.Ct. 1230, 84 L.Ed.2d 367 (1985).

The district court concluded that the legislative lobbying and other political activities engaged in by the Ferris Faculty Association and its affiliated unions were sufficiently related to the unions' duties as the collective bargaining representative of the plaintiffs to be chargeable to them. The major lobbying expense held chargeable by the district court was the Preserve Public Education program of the Ferris Faculty Association. The district court found that the program "was directed at securing funding for public education in Michigan" and held the expenses of the program chargeable because such a program is "directly related" to the duties of an exclusive bargaining representative. The district court also approved charging dissenting employees for articles relating to lobbying and similar political activities in the *Teacher's Voice*, the primary publication of the Michigan Education Association, which is available to all bargaining unit members. Despite the objections raised to these expenditures by the plaintiffs, we cannot disagree with the district court's decision.

The plaintiffs raised several objections to the district court's approval of charging dissenting employees for lobbying and other political activities of the unions. They disputed the finding of the district court that the Preserve Public Education program was a lobbying program directed at securing funds for public education in Michigan but instead contended that the program primarily involved electoral campaigns, including the contesting of ballot issues and the passing of millages. Even if the district court's finding that the Preserve Public Education program was a "lobbying" program were determined by this court to be clearly erroneous, we still believe that the costs of the program are constitutionally chargeable to dissenting employees. Contrary to the plaintiffs' contention,

"political" activities by public sector unions other than legislative lobbying may be charged to dissenting employees if such activities are directly related to collective bargaining. *See Knight*, 571 F.Supp. at 5-7. The plaintiffs in their brief admit that the Preserve Public Education program involved not only lobbying but also millage and ballot campaigns *necessary to fund public education*. Because the terms and conditions of employment for the public sector employees represented by the unions in this case are obviously closely connected to the funding provided to public education, we uphold the district court's decision allowing dissenting employees to be charged for the lobbying and other "political" activities involved in the Preserve Public Education program.

Similarly, we reject the plaintiffs' contention that articles in the *Teacher's Voice* relating to lobbying and other political activities of the unions were improperly found chargeable to dissenting employees. *Ellis* clearly held that dissenting employees may be charged for the costs of a union publication insofar as the publication reported on activities for which dissenters could be charged. 466 U.S. at 450-51, 104 S.Ct. at 1893-94. The plaintiffs assert that articles in the *Teacher's Voice* relating to general lobbying for funds for education may not be charged to them because such lobbying was not directly concerned with Ferris State College and the Ferris Faculty Association. This contention is without merit. It is unrealistic to expect a union, when lobbying a state legislature for funds for public education, to lobby for monies to support each specific institution separately. In our opinion, union lobbying to obtain funds for public education generally is sufficiently related to the unions' duties as the exclusive bargaining representative of the plaintiffs for such lobbying and for articles pertaining to such lobbying and other similar political activities to be

chargeable to the plaintiffs.[1] *See Ellis*, 466 U.S. at 448-49, 104 S.Ct. at 1892-93.

The plaintiffs additionally object to the district court's holding that certain expenditures of the Michigan Education Association and the National Education Association were chargeable even though the expenditures were for union services provided to employees in other bargaining units, rather than for employees at Ferris State College. Our interpretation of *Ellis*, however, forces us to conclude that the plaintiffs' position is untenable. In *Ellis*, the Supreme Court held that union expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative were chargeable to dissenting employees, and the Court applied this general standard to various types of challenged union expenditures. The *Ellis* court concluded that dissenting employees could be charged for the expenses of the union's national convention, even though employees in other bargaining units participated in and benefited from such conventions. Moreover, the Court held that dissenters could be charged for the costs of a union publication insofar as the publication reported on activities chargeable to dissenters, even if the chargeable activites reported on were *unrelated* to the specific bargaining unit of the dissenting employees. Given the Supreme Court's decision in *Ellis*, we believe that the

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[1]Similarly, the plaintiffs object to the district court allowing particular articles in the *Teacher's Voice*, including articles on ballot propositions involving utility rates and a nuclear weapons freeze, to be charged to them. Although the district court may have erred in permitting plaintiffs to be charged for a few particular articles, we decline to overturn the district court's decision. It is not our task to review each and every union expenditure, no matter how minor, for conformity with the law. Because we believe that the district court correctly interpreted and applied the law to the facts of this case, we will not reverse the district court's decision on the basis of allegations of essentially *de minimis* error.

district court did not err in finding the challenged expenditures of the Michigan Education Association and the National Education Association, which were pertinent to the unions' duties as bargaining representatives, to be chargeable to the plaintiffs. *See also Crawford v. Air Line Pilots Association International*, 870 F.2d 155 (4th Cir.1989), in which the Fourth Circuit allowed a union to use the agency fees paid by dissenting employees for expenditures outside of the dissenters' immediate bargaining unit because the expenditures in question were, as required by *Ellis*, "germane" to the union's obligation as bargaining representative.

The plaintiffs furthermore object to the district court's decision allowing them to be charged for union expenditures made in publicizing, preparing for and threatening a strike that would be illegal under Michigan law. Because the union did not actually engage in an illegal strike, the district court found these expenditures chargeable, and we decline to overturn the district court's decision. Based in part upon the testimony of a union witness whom the district court specifically credited, the district court found that, during the process of negotiating a new collective bargaining agreement with Ferris State College, the Ferris Faculty Association spent funds to prepare for a possible strike and to publicize the union's position so as to put pressure on Ferris. 643 F.Supp. at 1312-13. The district court reasoned that such negotiation tactics and public relations activities were within the range of reasonable bargaining tools available to a public sector union during contract negotiations and therefore charged the dissenting employees for the strike preparation and public relations expenses. *See Abood*, 431 U.S. at 228, 97 S.Ct. at 1795. Because the district court's findings of fact on this issue are entitled to considerable deference, *Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985), and because we see no legal errors in the reasoning of the court, we uphold the

decision to charge plaintiffs for the strike preparation and related public relations expenses.

Finally, the plaintiffs assert that the district court improperly charged them for other miscellaneous union expenditures, including expenditures for professional activities and for general public relations activies.[2] We believe that these miscellaneous expenditures were properly charged to plaintiffs. Public relations expenditures designed to enhance the reputation of the teaching profession and professional/educational expenditures intended to improve the profession generally and the skills of teachers specifically are, in our opinion, sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters. In *Ellis*, the Supreme Court expressly permitted dissenting employees to be charged for union expenditures for social activities, even though such activities were "not central" to the union's function as a collective bargaining representative. 466 U.S. at 449-50, 104 S.Ct. at 1893. Although the expenditures for professional and public relations activities challenged by plaintiffs in this case may not be "central" to collective bargaining, such activities are "sufficiently related to it" to be charged to dissenting employees, 466 U.S. at 449, 104 S.Ct. at 1893, and, in any event, we, as the Court in *Ellis*, are not inclined to scrutinize such *de minimis* union expenses. 466 U.S. at 450, 104 S.Ct. at 1893.

Based upon our foregoing discussion, we affirm the decision of the district court that the challenged union expenditures are constitutionally chargeable to the plaintiffs.

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[2]In their brief, the plaintiffs also object to being charged for the "international activities" of the unions. We do not address this issue because the National Education Association has made the issue moot by agreeing to refund the funds involved.

The judgment of the district court is affirmed.

MERRITT, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's holding that union expenditures to send Ferris Faculty Association delegates to the Michigan Education Association and National Education Association conventions and to participate in the 13 E Coordinating Council are chargeable to the dissenting faculty members. I do not agree, however, that in a "closed shop" the First Amendment allows the teachers' union, the NEA and its Michigan subsidiaries, to exact union dues from dissenting faculty members of the College bargaining unit to support (1) union lobbying in the state legislatures; (2) union efforts in state and local elections on behalf of candidates and issues; (3) the organizing, public relations and other expenses of teacher bargaining units in schools other than Ferris College; (4) the union's expenses in preparing for illegal strikes at Ferris College which the dissenting faculty oppose and the public relations activites supporting such illegal strikes; and (5) general public relations activities at the state and national levels.

Although my brethren point to a small part of the language in *Abood* to support their conclusion that all kinds of activities not directly connected to the bargaining unit are chargeable to dissenting members of an agency shop, the entire section from *Abood* makes clear that it is the relation of the challenged activity to the bargaining unit which is crucial. *Abood*, 431 U.S. at 236, 97 S.Ct. at 1800. My brothers appear to believe that this relationship need not be a very *close* one. On the contrary, the union needs to show costs of activities which are related to the

particular bargaining unit and not undifferentiated costs of lobbying the legislature generally.

To hold otherwise is to significantly expand *Ellis* without justification and without serious attention to the protections of the First Amendment. It is true that *Ellis* expresses the very general First Amendment rule announced in *Allen* and *Abood*, requiring expenditures to be "germane to the union's duty as collective-bargaining agent." *Ellis*, 466 U.S. at 447, 104 S.Ct. at 1892. Applying the Railway Labor Act in light of First Amendment principles, however, the Court determined that Congress did not authorize the charging of expenditures that were not related to "the duties of [the Union as] an exclusive representative *of the employees* in dealing with *the employer*." *Id*. at 448, 104 S.Ct. at 1892 (emphasis added). The Supreme Court insisted that an expenditure must be for "activities normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative *of the employees in the bargaining unit.*" *Id*. (emphasis added). There simply is no authority in *Ellis*, *Abood* or *Allen* for holding that expenses unrelated to a union's activity on behalf of employees in the plaintiffs' own shop pass constitutional muster.

Allowing the union to exact dues from dissenting non-Union members of the closed shop bargaining unit to pay expenses unrelated to bargaining unit negotiations or grievances unjustifiably expands the holding of the Supreme Court in *Ellis*. It ignores the warning expressed in *Ellis* itself that the closed shop, which forces individuals against their will to support union activities, is already a significant infringement on freedom of expression and conscience: "But by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose

principles and demands he may disagree." *Ellis*, 466 U.S. at 455, 104 S.Ct. at 1896.

Because the concept of the closed shop seriously affects free speech values, the Supreme Court in *Ellis* left open only a small range of "free-rider" expenses that the dissenting member can be forced to pay. In light of First Amendment protections, those expenses must relate to the expenses of the bargaining unit itself "to defray the costs of collective bargaining, contract administration, and grievance adjustment." *Id*. at 447, 104 S.Ct. at 1892. Expenses for "the expansion of overall union power," *id*. at 451, 104 S.Ct. at 1894, may not be charged to dissenters, *id*. at 452, 104 S.Ct. at 1894. Litigation expenses not connected to the activities of the bargaining unit itself are not allowed. In dealing with litigation expenses, the Supreme Court tells us clearly where the line should be drawn:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes, arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation, litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. *The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees.*

Id. at 453, 104 S.Ct. at 1895 (emphasis added).

Thus *Ellis* establishes the principle that the union expenses charged in a closed shop must relate closely to the activities of the bargaining unit of the dissenting members. The general political, lobbying, public relations and organizing activities of the NEA and its state affiliate

obviously have no such relationship. The union should not be allowed to charge the dissenters with these general expenses, many of which are connected with political positions and philosophies with which the dissenters disagree. To allow the union to exact payments for lobbying, electoral campaigning and public relations forces the dissenters to support ideological positions with which they disagree. The alternative is either to submit or to lose your job. Such forced association and coerced speech violates the First Amendment.

For example, my brothers approve the District Court's determination that certain MEA and NEA expenditures on services to other bargaining units and on the publication of general articles on labor relations in the *Teacher's Voice* are chargeable. A single common error infects both these holdings. The District Court failed to inquire which expenditures directly supported affiliate union locals in *other* bargaining units. It merely ascertained that certain expenditures were germane to the union's general role as bargaining agent for many units without asking the question whether the expenditure is directly related to the Ferris College bargaining unit. If this question had been asked, the insult to First Amendment values arising from forcing the plaintiffs to support the articles on the nuclear freeze proposal and on ballot propositions involving utility rates could not be characterized as merely *"de minimis."*

The only expenses itemized above which directly relate to the Ferris College bargaining unit's activities are the costs of preparing for a public employee strike which the parties agree would have been illegal if carried out. The dissenters were against the illegal strike. If the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts. To permit a closed-shop union to

force dissenters to finance unlawful acts on pain of losing their jobs is no small First Amendment violation.

Accordingly, I respectfully dissent.

APPENDIX B

OPINION AND JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

August 25, 1986

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION-MEA-NEA, Michigan Education Association, National Education Association of the United States, the Board of Control of Ferris State College, S. Eugene Bychinsky, Robert L. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

No. G 78-346.

United States District Court,
W.D. Michigan, S.D.

Aug. 25, 1986.

OPINION

ENSLEN, District Judge.

Plaintiffs bring this action under 42 U.S.C. §§ 1983, 1985, 1986 claiming violations of rights secured to them by the first and fourteenth amendments to the United States Constitution. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343. Specifically, plaintiffs allege that they are required by state law to pay to the defendant unions an agency shop or service fee in lieu of union dues and that this agency shop fee is not applied by the unions exclusively to purposes germane to their duties as collective bargaining representative for plaintiffs' bargaining unit. Plaintiffs also claim that the procedures implemented by

the unions to determine and collect service fees are inadequate. Plaintiffs argue that defendants' practices violate their constitutional rights. Both damages and injunctive relief are sought against the union defendants. However, pursuant to an approved stipulation contained in the Pretrial Order of January 15, 1985, solely injunctive relief is sought against the nonunion defendants. Pretrial Order at 89-90. On the basis of this stipulation, the nonunion defendants did not participate at trial.

This case was originally filed in this district on May 22, 1978, and was ultimately tried to the bench over 12 trial days in January and April of this year. The court entertained the testimony of 12 witnesses and accepted 90 exhibits into evidence. The parties completed their post-trial briefing on June 6. This opinion is entered pursuant to Fed.R.Civ.P. 52(a).

I. FINDINGS OF FACT

A. Stipulated Facts

Plaintiffs James P. Lehnert, Elmer S. Junker, James E. Lindsey and John R. Schauble are tenured members of the faculty of Ferris State College (Ferris). Plaintiffs Theodore D. Speerman and Sam C. Peticolas were tenured members of the Ferris faculty until their respective retirements on November 22, 1978 and May 15, 1982.

Defendant Ferris Faculty Association-MEA-NEA (FFA), an affiliate of the Michigan Education Association (MEA) and the National Education Association (NEA), has served as the exclusive bargaining representative of the faculty of Ferris pursuant to Mich.Comp.Laws § 423.211 at all times pertinent to this case. Pursuant to the unified membership concept, membership in the FFA also constitutes membership in the MEA and NEA. The MEA is

a Michigan corporation; the NEA is incorporated under a special act of the United States Congress.

Defendant Board of Control of Ferris State College is a public body corporate established and existing under the constitution and laws of the State of Michigan. Mich. Const. art. VIII, § 6; Mich.Comp.Laws § 390.801 *et seq.* It is empowered to control and manage Ferris.[1] In addition to the Board of Control, other nonunion defendants are the individual members of the Board of Control and the President and Vice-President for Business Affairs of Ferris, in their official capacities.

Since on or about February 22, 1975, the FFA and Ferris have entered into successive collective bargaining agreements containing agency shop provisions.[2] After the FFA and Ferris entered into their first agency shop agreement, the authorizing statute, Mich.Comp.Laws § 423.210, was challenged in the Michigan courts and eventually appealed to the United States Supreme Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court upheld the constitutionality of the statute and outlined the permissible uses of agency shop fees in public employee unions. The concept of the current agency shop provision was proposed thereafter by Ferris during factfinding upon the advice of

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[1]Ferris is an agency and arm of the State of Michigan, established by the state's constitution and required to be funded by the state. Mich. Const. art. VIII, § 4.

[2]The original agency shop provision was included in the labor contract pursuant to the authority of 1973 Mich.Pub. Acts 25, § 1, codified at Mich.Comp.Laws § 423.210. This early provision stated that all members of the bargaining unit not belonging to the FFA were required to pay agency shop fees equivalent to union dues. The provision also authorized the President of the college, acting as the agent of the Board of Control, to discharge any member of the bargaining unit who failed to comply.

its counsel and with the intent of complying with *Abood*.[3]

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[3]Section 2.6 of union defendants' exhibit I is the agency shop provision of the collective bargaining agreement between Ferris and the FFA for 1981-1984. That section provides, in pertinent part:

> A. Each employee covered by the negotiated Agreement between the Board of Control of Ferris State College and the Ferris Faculty Association (Dated November 19, 1981) shall, as a condition of employment, on or before thirty-one (31) days from the date of commencement of professional duties or July 1, 1981, whichever is later, join the Ferris Faculty Association or pay a *service fee to the Association equivalent to the amount of dues uniformly required of members of the Ferris Faculty Association, less any amounts not permitted by law;* provided, however, that the bargaining unit member may authorize payroll deduction for such fee. *In the event that a bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the College shall, at the request of the Association, deduct the service fee from the bargaining unit member's salary and remit the same to the Association under the procedure provided below.*
>
> B. The procedure in all cases of non-payment of the service fee shall be as follows:
>
> 1. The Association shall notify the bargaining unit member of non-compliance by certified mail, return receipt requested, explaining that he or she is delinquent in not tendering the service fee, specifying the current amount of the delinquency, and warning him or her that unless the delinquent service fees are paid or a properly executed deduction form is tendered within fourteen (14) days, he or she shall be reported to the College and a deduction of service fee shall be made from his or her salary.
>
> 2. If the bargaining unit member fails to comply, the Association shall give a copy of the letter sent to the delinquent bargaining unit member and the following written notice to the College at the end of the fourteen (14) day period:
>
> The Association certifies that (name) has failed to tender the periodic service fee required as a condition of employment under the 1981-84 Faculty Agreement and demands that under the terms of this Agreement, the College shall deduct the delinquent service fees from the collective bargaining unit member's salary. The Association certifies that the amount of the service fee includes only those items authorized by law.
>
> 3. The College upon receipt of said notice and request for deduction, shall act pursuant to Section A above. In the event of compliance at any time prior to deduction, the request for deduction will be withdrawn. The Association, in enforcing this provision, agrees not to discriminate between bargaining unit members.
>
> C. With respect to all sums deducted by the College pursuant to this Article, The College agrees promptly to disburse said sums directly to the Association.
>
> D. Bargaining unit members paying the service fee provided for herein or whose service fees have been deducted by the College from their salaries may object to the use of their service fee for matters not permitted by law. *The procedure for making such objections is that officially adopted by the Association.* A copy of the Association policy will be provided by the Association upon a request of a bargaining unit member.
>
> . . . .
>
> F. This Article shall be effective for each academic year of this Agreement and all sums payable hereunder shall be determined from the beginning of each academic year. Persons becoming members of the collective bargaining unit during the course of an academic year shall have their service fee prorated over the academic year.
>
> . . . .
>
> I. The Association will certify at least annually to the College, fifteen (15) days prior to the date of the first payroll deduction for professional fees or service fees, the amount of said professional fees and the amount of the service fee to be deducted by the College, and that said service fee includes only those amounts permitted by the Agreement and by law.
>
> J. Should the provisions of 2.6, Agency Shop, be found contrary to law as a result of a final decision for which no appeal is processed, and which is binding on the parties to this Agreement, the parties agree to meet on written request of either party to negotiate to bring Section 2.6 into compliance with any such final decision, such negotiations to be limited to the provisions of Section 2.6 and will not affect the terms and conditions of this Agreement which shall remain in full effect for the life of this Agreement. [Emphasis added.]

The agency shop provision of the 1984-1987 collective bargaining agreement between Ferris and the FFA is identical in all respects to its immediate predecessor.

There are three principal differences between the early agency shop provisions and those in effect since November 19, 1981. The first difference is that under the present provision, Ferris does not discharge nonunion members for failure to pay the service fee. Rather, as authorized by Mich.Comp.Laws § 408.477, Ferris will now deduct the

appropriate service fee from the paycheck of the dissenting member of the bargaining unit after due notice and opportunity to comply. The second distinction of the modern agency shop provision is that the service fees are now computed as the equivalent to the amount of the dues required of FFA members, "less any amounts not permitted by law." The third and final major change is that dissenting members of the bargaining unit may now "object to the use of the service fee for matters not permitted by law" by utilizing the procedure "officially adopted by the Association."

Pursuant to stipulations and orders entered on April 21, 1983, and October 22, 1984, to avoid litigation expense and time, defendant unions have refunded, or agreed to refund, with simple interest, all service fees paid by plaintiffs, and waived any claims they might have had against plaintiffs for service fees not paid, for periods prior to the 1981-1982 fiscal year (September 1, 1981 to August 31, 1982). Pursuant to the stipulation and order entered April 21, 1983, plaintiffs have deposited with the registry of the court the MEA's and FFA's portions of the service fees demanded for the 1981-1982 and 1982-1983 academic and fiscal years; plaintiffs still in the bargaining unit are obligated during the pendency of this litigation to similarly deposit subsequent service fees after notice of the MEA and FFA portions; and defendant unions are enjoined from otherwise enforcing the agency shop agreement against plaintiffs during the pendency of this litigation. The amounts deposited with the court are: James P. Lehnert, Elmer S. Junker, James E. Lindsey and John R. Schauble, $455.00 each; Sam C. Peticolas, $215.00. No subsequent deposits have been made because the FFA has not given notice to plaintiffs of the appropriate amounts.

Also to avoid expense and time, the parties have further agreed that the issue of which union expenditures constitutionally are chargeable to plaintiffs shall be tried

only with regard to fiscal year 1981-1982. However, the proportions of the expenditures of defendant unions for various purposes during that year shall not be treated as representative of the proportions of their expenditures during subsequent fiscal years. During the 1981-1982 academic and fiscal year there were an average of approximately 502 full-time equivalent employees, including five of the plaintiffs, in the bargaining unit represented by the FFA.

In practice, the amount of the service fee certified to Ferris by the FFA (in cases where service fee payors have not asserted constitutional objections) has been equivalent to the amount of dues required of members of the FFA. Of course, under the agreement of April 25, 1979, mentioned above, plaintiffs have paid reduced service fees into an interest-bearing escrow account and no payroll deductions from their salaries have been made by Ferris since that time. Pursuant to and in furtherance of the governance documents of the FFA, MEA and the NEA, a substantial portion of the service fees collected from nonunion members of the bargaining unit has been and will continue to be transmitted by the FFA to the MEA and the NEA. In fiscal year 1981-1982 an individual's total dues (or service fee in the case of a nonmember not asserting a timely constitutional objection) amount of $284.00 was disbursed as follows: FFA, $24.80; MEA, $211.20; and NEA, $48.00.

In fiscal year 1981-1982, $10.00 of the MEA's portion of the service fee was placed in a Teacher Assistance Program (TAP) Fund. A major purpose of this TAP Fund was to provide direct financial assistance to teachers who were out of work permanently or temporarily as a result of a strike. After the decision in *Male v. Grand Rapids Education Ass'n*, 98 Mich.App. 742, 295 N.W.2d 918 (1980), *app. denied*, 412 Mich. 851 (1981), became final, the MEA acknowledged that the $10.00 portion of the

service fee allocable to the TAP Fund would additionally be considered nonchargeable for objecting nonunion employees. Union defendants' exhibit G additionally renders nonchargeable a portion of MEA staff time spent administering the TAP Fund.

Plaintiffs are not and have not been members of the FFA. Both before and after filing the instant action, and in their complaint itself, they notified the FFA, MEA and NEA of their objection to the use, even temporarily, of any portion of their service fees for purposes other than negotiating a collective bargaining agreement with the Board of Control, administering that agreement, and adjusting grievances arising under it. The MEA and NEA have spent and will continue to spend portions of service fee monies to support activities other than negotiating a collective bargaining agreement with the Board of Control, administering that contract and adjusting grievances arising under it. Although the parties agree that collective bargaining, contract administration and grievance adjustment occurring at bargaining units other than Ferris can affect collective bargaining, contract administration and grievance adjustment occurring at Ferris, the parties disagree as to whether the plaintiffs constitutionally may be required to support such activities occurring other than at Ferris.

The MEA and NEA have adopted procedures by which dissenting service fee payers, such as plaintiffs, may register their protest against the use of their money for certain purposes. The MEA Policy and Procedures Regarding Objections to Political-Ideological Expenditures, as revised by the MEA Board of Directors on August 6,

1982, is union defendants' exhibit J.[4] The NEA's Political

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[4]This procedure is central to the issues of this case and will be quoted in full:

POLICY REGARDING OBJECTIONS TO
POLITICAL-IDEOLOGICAL EXPENDITURES

Upon timely objection, no individual required to pay a service fee to a legal association affiliated with the Michigan Education Association (MEA) shall be required, through payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An individual who, in compliance with the administrative procedures established by the Executive Director of the Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be entitled to pay a reduced fee based upon the Executive Director's determination of the percentage of the MEA's annual budget spent for ideological or political purposes unrelated to collective bargaining, contract administration[,] grievance adjustment and employee representation.

OBJECTIONS TO POLITICAL-IDEOLOGICAL
EXPENDITURES
ADMINISTRATIVE PROCEDURES

Section I

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through 15th of each year and shall specify those causes, programs and activities to which the individual objects, or that the individual objects to the use of a portion of her/his service fee for any political activity or ideological cause unrelated to collective bargaining, contract administration, grievance adjustment and employee administration. An objection must be renewed each fiscal year (September 1 to August 31).

Upon receipt of the objection, the Executive Director (or her/his delegate) shall determine first whether the cause, program, or activity to which the individual objects is in fact an ideological cause or political activity within the meaning of the policy. An ideological cause or political activity within the meaning of the policy is one which is unrelated to organizing, collective bargaining, contract administration, grievance adjustment or employee representative [*sic*]. Second, the Executive Director or

Activity Rebate Procedure, as last amended by the NEA

her/his delegate, if she/he determines that in fact the cause, program or activity to which the individual objects is an ideological cause or political activity, shall determine the pro rata amount of the individual service fee that has been expended upon or will be expended upon such cause, activity or program. If the individual has objected to a portion of her/his service fee for any political activity or ideological cause, as defined herein, the Executive Director or her/his delegate shall determine (1) the pro rata amount of the individual service fee that has been expended or will be expended on all such causes or activities and (2) the reduced fee accordingly required to be paid by the individual. Upon written request, the Executive Director or her/his delegate shall provide to the individual a copy of the approved budget for the year in question.

Section II

An individual dissatisfied with the determination of the Executive Director may appeal that determination to the Executive Committee of the Board of Directors of the Michigan Education Association. An appeal to the Executive Committee may be taken within 30 days of receipt of the determination of the Executive Director. The appeal shall be taken by giving a written notice to the Executive Director of the individual's desire to appeal her/his determination to the Board of Directors. The individual, along with her/his notice of appeal, may submit to the Executive Committee such written statements and other evidence in support of her/his position as she/he deems necessary. The Executive Committee shall reach a decision on the appeal as soon as practicable, preferably within 60 days for receipt of the appeal. If the individual is dissatisfied with the decision of the Executive Committee, she/he may further appeal by commencing, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission.

Section III

These procedures apply to amounts remitted to the Michigan Education Association as well as amounts retained by the local association affiliated with the Michigan Education Association. The local associations shall reimburse the Michigan Education Association for any amounts rebated on its behalf under the policy.

Executive Committee on March 27, 1979, is plaintiffs' exhibit 1.[5]

The fiscal year 1981-1982 expenditures of the FFA from dues and service fee monies are set forth in Appendix A. Although the parties disagree as to the chargeability of many of the activities upon which the FFA, MEA and NEA expend service fee monies, they do agree on the general proposition that administrative or overhead expenses should be allocated proportionally between expenses (not including administrative or overhead expen-

[5]The NEA has adopted a procedure that is somewhat more complex than that implemented by the MEA. Initially, within 30 days after the NEA budget for a fiscal year is finalized, the Executive Director of the NEA computes a "preliminary political activity rebate" percentage which equals that percentage of NEA dues allocated for "political activity," as that term is defined in Section I.H. of the Exhibit. Copies of the NEA's political activity rebate procedure are posted by all NEA affiliates (i.e., FFA) and published annually in the NEA *Reporter* to give notice to nonmembers. Dissenting nonmembers of the NEA who make a timely objection to the use of any portion of their service fees for "political activity" are notified that the above mentioned percentage of their service fee has been placed in escrow and that the political activity rebate to which he or she is ultimately entitled will be sent to him or her not more than 30 days after the close of the fiscal year in question. The final political activity rebate percentage is computed by the Executive Director by applying the same analysis as above to the actual NEA expenditures for the past fiscal year. Included in the final political activity rebate sent to the dissenting nonmember is an explanation for any differences between the preliminary and final rebate figures, and an explanation of the steps to be taken to challenge the final determination.

Pursuant to the NEA procedure, appeal of the Executive Director's final determination is first taken to the NEA Executive Committee. That decision may be challenged by filing for binding neutral arbitration in Washington, D.C. The expenses of this arbitration are paid by the NEA. The arbitrator must adhere to the NEA's definition of "political activity" and may increase but not decrease the final rebate percentage. Alternatively, Section VII.E. of exhibit 1 provides that the dissenting service fee payor may challenge both the NEA rebate and the state affiliate's (e.g., MEA's) rebate under the appeal procedure adopted by the state affiliate.

ses) found by the court to be chargeable and those found not chargeable. The expenses of the MEA Building and Site Fund during fiscal year 1981-1982 are to be treated as overhead expenses.

B. Adjudicated Facts

1. Ferris Faculty Association-MEA-NEA

In the Fall of 1981, at the beginning of the 1981-1982 fiscal year, the FFA was engaged in the process of negotiating a new collective bargaining agreement with Ferris. Negotiations did not go smoothly and, as reflected in plaintiffs' exhibit 33, a letter from the President of the FFA to the President of the MEA dated October 8, 1981, the FFA was considering going out on strike. In response to this situation, the MEA conducted a "job action investigation" at Ferris.

Warren D. Culver, who in 1981-1982 was the statewide Director of the MEA's UniServ division, testified that the term "job action" is synonomous with "strike" and that the purpose of a job action investigation is to appraise the status of the ongoing negotiations, to determine the willingness of the local's membership to support a strike if necessary, and to put pressure on the employer by making outward preparations for a possible strike. The effectiveness of this third function as a bargaining tool is evidenced by Mr. Culver's testimony that only one out of every seven or eight job action investigations actually culminate in a strike. The remaining six or seven troublesome negotiations are resolved at the bargaining table short of a strike. The court finds Mr. Culver's testimony on this point to be credible.

In conjunction with the job action investigation undertaken at Ferris in the fall of 1981 the FFA, in conjunction with the MEA, established what the union

defendants designate a "crisis center;" plaintiffs call it a "strike headquarters." Once again referring to the credible testimony of Mr. Culver, the court finds that whatever label is attached to this facility, prior to a strike it serves as a meeting place for the local's membership, a base from which tactical activities such as informational picketing can be conducted, and serves to apply additional pressure on the employer by suggesting, whether true or not, that the local is prepared to strike if necessary. While the parties stipulated at the trial that the FFA did not engage in a strike in 1981-1982, Appendix A establishes that the FFA did expend a total of $3821.04 on the crisis center/strike headquarters. Appendix A also reflects that a total of $832.96 was spent for informational picketing, media exposure, signs, posters and buttons. In the negotiations period, these expenses are incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer. This type of public opinion and support is very important during contract negotiations involving public sector labor unions such as the FFA given the nature of the employment and the funding available to the college.

The court also finds that $4788.77 was expended by the FFA during 1981-1982 on collective bargaining, contract ratification, negotiations training, and arbitration. Another $150 was spent for rent to hold membership meetings. A total of $1026.84 was used to send FFA representatives to the MEA and NEA Representative Assemblies. The FFA also spent $666.42 on the 13E Coordinating Council. That council is the UniServ unit for the separate bargaining units at Ferris State College and Central Michigan University.

In terms of FFA expenses for 1981-1982 related to political activities, Appendix A reveals that $149.99 was spent on the Preserve Public Education (PPE) Conference. There was much testimony given and many exhibits

received regarding the nature of the PPE program in 1981-1982. The court finds that this program was best summed up in the credible testimony of Warren Culver:

> The "Preserve Public Education Program" was an attempt on the part of the [MEA] to develop meaningful coalitions in the various communities so that we could pass millages, fight ballot issues, and do the kind of things that are absolutely necessary to fund public education, so that we have some reason to be able to continue to exist, bargain the contracts, and gain some benefit for our members.
>
> . . . .
>
> . . . I think that one of the most important things that has to be understood about public employee bargaining is that the amount of money that we get comes from either local property taxes, state taxes and some federal tax. And if we have no way of raising that money, which is all allocated through the legislative process or an election, then we have no way to bargain.
>
> So it is really the front line bargaining of our contracts.

Transcript of Culver Testimony at 4-5. Further, a total of $102.69 was expended for the purposes of lobbying the state legislature and attending an MEA Legislative Dinner. However, no attempt was made to identify the specific issues on which the FFA was lobbying with respect to these expenditures.

Finally, Appendix A states that $2500 was loaned by the FFA to another association in 1981-1982. At trial, it was stipulated that this was a no-interest loan made to the MEA local in the Hisperia School District to support it in a strike. It was further stipulated that this loan was repaid in full the following fiscal year. The remainder of the expenses of the FFA during 1981-1982 were administrative in nature.

2. Michigan Education Association

The MEA is a labor organization which, through 800-900 local affiliates such as the FFA, represents public school employees throughout Michigan. Like most public sector labor unions, it is a highly politicized organization, active in causes both related and unrelated to collective bargaining, contract administration and grievance adjustment. Prior to August 1981, the MEA had been divided into eight divisions. Four of these divisions were administrative in nature: General, Human Resources, Finance, and Internal Operations. The remaining four divisions were UniServ, Public Affairs, Professional Development and Human Rights (PDHR), and Program Development and Support.

The UniServ division was the MEA's main line of contact with the local affiliates. It also accounted for approximately 60% of the MEA's total budget. Basically, UniServ directors (of which there were 97 in 1981-1982) were responsible for delivering the full range of MEA services to the members of the local units. It appears from all the testimony received that these directors spent the majority of their time on activities directly related to collective bargaining, contract administration and grievance adjustment. Fu ther, the UniServ division included the Legal Services program. Through this program, the local associations were provided with legal representation on all employment-related matters. This service was provided on an "as needed" basis by private law firms and in-house counsel. UniServ also employed three negotiations specialists and two organizing specialists who were all supervised by the Director of Organizing and Negotiations.

The Public Affairs division was responsible for the lobbying activities of the MEA and for a majority of its communications and public relations activities. The MEA's

lobbying activities traditionally cover a broad spectrum of issues ranging from pursuing state and local aid for public education to supporting the Equal Rights Amendment. Much of this political activity was undertaken to insure that the state's public schools were adequately funded and the union's members would be able to negotiate beneficial contracts. Of course, any legislative activity in the area of Michigan's Public Employment Relations Act, which affects the MEA's ability to engage in collective bargaining, was closely monitored. Public Affairs also kept abreast of changes in federal laws and regulations which would impact on collective bargaining, contract administration and employee representation. In addition, the *Teacher's Voice*, the primary publication of the MEA reporting on all activities of the organization, was published by this division and distributed to all members of affiliated bargaining units. Finally, the Public Affairs division administered the association's political action committee—MEA-PAC.

The PDHR division engaged four of its eleven professional staffers as research consultants. These research consultants collected data on school finance, collective bargaining and other areas related to public school employment. They then prepared a negotiations data book used by the UniServ staff in bargaining contracts and maintained comprehensive statistics on contract settlements throughout the state. The research consultants also prepared prepackaged surveys for the local associations to use in polling their members to determine the members' interests and concerns going into negotiations. These surveys often concerned the comparability of terms and conditions of employment in surrounding or similar schools. This type of information is highly relevant to the development of bargaining demands. Research services were available to the locals on an as needed basis. In addition to the research consultants, the division also employed seven PDHR consultants. These consultants engaged in three primary areas: professional development

(including instruction, curriculum development and staff development), leadership training, and human rights.

The Program Development and Support division was primarily concerned with conventions and internal governance. The division's budget included the salaries of the MEA Division Directors, the Executive Director, the President and Vice-President, and the administrative assistants to these individuals.

In August 1981, the MEA Board of Directors approved a reorganization of the association's internal structure. That reorganization was completed by the end of the 1981-1982 fiscal year and resulted in the reduction of the number of budget divisions from eight to five. The reorganized budget still had a General category and four main institutional divisions. Uniserv remained the largest single division in the MEA although its size was reduced slightly and some of its smaller departments were transferred. Three new divisions were created: Administrative, Program Services, and Corporate Affairs.

The Administrative division had three primary program areas: the Department of Finance and Membership, the Department of Internal Operations, and the Department of Human Resources. The Program Services division began the 1981-1982 fiscal year with five departments: Government Affairs, Legal Services, PDHR, Organizing and Bargaining, and Membership Services. However, the Board of Directors eliminated Organizing and Bargaining as a separate department during that year; it is unclear whether those functions were then performed by some other department within Program Services or another division. Finally, the Corporate Affairs division was engaged in developing and delivering special services to the membership. Included in this division were the following: the Michigan Educators Financial Services Association (MEFSA) (providing individual economic

benefits and financial services to members), the Michigan Education Association Legal Services Plan (MEALS) (providing free legal services for members), and the Michigan Education Special Services Association (MESSA) (providing various insurance benefits for members).

Considerable testimony was offered concerning the financial and accounting systems utilized by the MEA. Most of this testimony revolved around the bi-annual budget. In the spring of 1980, a budget was approved by the MEA Representative Assembly covering fiscal years 1980-1981 and 1981-1982. However, as a result of a decline in MEA membership, a revised budget for the 1981-1982 fiscal year was developed by the Board of Directors and approved by the fall 1981 Representative Assembly. This revised budget is Union defendants' exhibit A. According to the testimony of Catherine Anderson, Director of Finance at the Michigan Education Data Network Association (MEDNA), a reorganized budget was subsequently prepared for 1981-1982 to reflect the administrative reorganization of the MEA during that year.

With respect to the MEA's revised 1981-1982 budget, the four divisions of an administrative nature had individual budgets of the following amounts: General, $425,629; Human Resources, $255,041; Finance, $632,400; Internal Operations, $1,257,300. In addition, the Building and Site Fund, which the parties stipulated would be treated as an administrative or overhead expense, was budgeted at $494,000 for that year. This results in a total budgeted administrative or overhead expense of $3,064,370. The remaining four divisions responsible for direct (as opposed to administrative) expenses had the following individual budgets: Program Development and Support, 1,551,300; UniServ, 11,453,700; Public Affairs and Communications, 1,373,200; and Professional Development and Human Rights, 973,600. Therefore, direct budgeted expenditures

for 1981-1982 were $15,351,800, and the overall MEA revised budget for that year was $18,416,170.[6]

When the MEA prepared its reduced fee calculations for 1981-1982, it acknowledged that most of its employees engaged in some activity that was arguably nonchargeable. Therefore, the association had its division and department directors estimate the approximate percentage of time that the average person in his or her area historically spent on nonchargeable activity. These time estimates were generally made after consultation with legal counsel, but rarely involved the review of contemporaneous hard data. Indeed, witness after witness testified that it was not and had not been the practice of MEA staffers to record the nature of their daily activities on time sheets. After these estimates of the percentage of nonchargeable time were prepared, a "cushion" was added to increase the effective nonchargeable percentage to cover any error. The final nonchargeable percentage was then applied to the annual dues of MEA members which were computed on the basis of the 1981-1982 revised budget. The results of this calculation are set forth in union defendants' exhibit G. Catherine Anderson testified that the MEA's records for 1981-1982 are insufficient to enable an independent certified public accountant to conduct an audit of union defendants' exhibits G and OOOO. Transcript of Anderson Testimony at 33-34.

At trial, the MEA continued to argue the validity of its final reduced fee calculation by presenting evidence regarding the estimated nonchargeable portion of its 1981-1982 revised budget. Although evidence of actual expenditures for that year, as opposed to budget figures, should have been available to the MEA, the only such

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[6]This figure excludes the MEA-PAC and TAP Fund which the Union defendants concede are completely nonchargeable.

evidence that was introduced was the schedule of expenses contained on the last page of plaintiffs' exhibit 613. Moreover, this schedule of expenses was formatted not on the revised budget for that year but on the *reorganized* budget.

Ms. Anderson also testified that actual total expenditures for any given year generally vary less than 2% from the total budgeted amount. However, she conceded that individual line items may vary by more than 2%. The court finds that Ms. Anderson's concession is an understatement. By reference to the actual versus budgeted figures for 1978-1979 and 1981-1982 listed in union defendants' exhibit A and plaintiffs' exhibit 613 respectively, it is clear that individual line items often vary considerably more than 2%.

The court was not at all aided in its calculation of a chargeable reduced service fee by evidence of estimated nonchargeable percentages of time and activity. Further, aside from the fact that exhibit 613 contains sparse detail of activity expenditures, the difference in the structures between union defendants' exhibits A and G (based on the revised budget) and plaintiffs' exhibit 613 (based on the reorganized budget) made an extrapolation of a reasonably accurate chargeable service fee impossible. For these reasons, I conclude that there are few instances indeed in which the MEA has established the chargeability of discrete actual expenditures.

The procedure by which the MEA implemented the service fee for nonunion objectors in 1981-1982 is set forth at note 4, *supra*. Recently, in the wake of the United States Supreme Court's Opinion in *Chicago Teachers Union v. Hudson*, ___ U.S. ___, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), a new policy and procedure regarding objections to the service fee was implemented. On May 7, the MEA Board of Directors adopted a new policy regarding objections to political-ideological expenditures. Shortly before

that, the Executive Director of the MEA adopted, upon the advice and recommendation of the Director of Legal Services, new administrative procedures to implement this policy. The new policy and procedures are currently in effect and are contained in union defendants' exhibit QQQQ. Due to their importance to the ultimate remedy in this case, they are also set forth in full in the margin.[7]

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[7] POLICY REGARDING OBJECTIONS TO POLITICAL-IDEOLOGICAL EXPENDITURES

Upon timely objection, no individual required to pay a service fee to a local association affiliated with the Michigan Education Association (MEA) shall be required, through the payment of such a fee, to contribute to the financial support of an ideological cause or political activity unrelated to collective bargaining, contract administration, grievance adjustment and employee representation, which he/she opposes. An Individual who, in compliance with the administrative procedures established by the Executive Director of the Michigan Education Association (Executive Director), objects to the use of a portion of his/her service fee to support such an ideological cause or political activity shall be required to pay a reduced fee based upon a determination of the percentage of the MEA's annual budgeted expenditures necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees.

OBJECTIONS TO POLITICAL-IDEOLOGICAL EXPENDITURES
ADMINISTRATIVE PROCEDURES

Section I

At the beginning of each fiscal year (September 1 to August 31), the Executive Director of the Michigan Education Association or his/her designee shall determine the amount of the MEA's total budgeted expenditures that will be expended on chargeable and nonchargeable activities. The Executive Director or his/her designee shall then calculate the reduced fee that an objector will be required to pay. By November 10 of each year, or as soon thereafter as possible, the Executive Director shall make available to all non-union employees information identifying the MEA's total budgeted expenditures and identifying the chargeable and nonchargeable budgeted expenditures. At the same time, the Executive Director shall make available information identifying the previous year's total budgeted expenditures, the year-end financial statements verifying the actual expenditures, and an analysis of the previous year's reduced fee calculation using the verified actual expenditures.

Section II

3. National Education Association

The NEA is a national voluntary labor organization of public school employees. The MEA is a state affiliate and the FFA is a local affiliate of the NEA. Through its various state and local affiliates, the NEA represents approximately 12,000 bargaining units nationwide. Like the MEA, the NEA is a highly politicized organization which engages in a variety of activities aimed primarily at promoting public education and public school employee welfare, in addition to improving the bargaining ability and position of its members and affiliates. The NEA is governed by the National Education Association Representative Assembly, Board of Directors and Executive Committee. Its actual expenses for 1981-1982 totaled $70,420,142.

Objections under the policy regarding Objections to Political-Ideological Expenditures ("the policy") shall be made by giving written notice to the Executive Director of the Michigan Education Association. Notice shall be given in writing during the period of September 1 through December 1 of each year and shall specify that the individual rejects the reduced fee calculation. An objection must be renewed each fiscal year.

Upon receipt of the written notice rejecting the reduced fee calculation, the Executive Director (or his/her designee) shall review the reasons, if any are given, for the rejection. The Executive Director will have 10 days to respond to the objector. If the Executive Director does not respond within the 10-day period it will be assumed that no merit was found in the individual's objection and the objector may proceed to the next step of this procedure.

Section III

An individual dissatisfied with the determination of the Executive Director shall appeal that determination by filing an Unfair Labor Practice Charge, or otherwise being bound by, appropriate proceedings in the Michigan Employment Relations Commission. If an unfair labor practice charge has not been filed by December 15, the union shall seek a reasonably prompt determination of the appropriate reduced fee by the Michigan Employment Relations Commission.

Section IV

Pending a decision of the Michigan Employment Relations Commission, the objector may be required to pay 100% of the reduced fee into an escrow account identified by the Executive Director.

At the outset, the court will make some findings regarding plaintiffs' claim that the NEA has waived its right to any and all service fees from these individual plaintiffs. It appears that in 1981, the NEA made some settlement offers to plaintiffs whereby the NEA would refund service fees collected and waive its right to some future fees in an attempt to avoid the prohibitively high expense of the instant litigation. Plaintiff Speerman, who had already retired at that time, accepted the NEA's offer of refund but the remaining plaintiffs did not. The parties could not agree on exactly what future fees were subject to the waiver and the settlement and release of the NEA did not transpire. Furthermore, plaintiffs were unwilling to forego their claim against the NEA for injunctive relief regarding its rebate procedures. In 1982, the court denied defendants' motion to dismiss for mootness on similar grounds. *Lehnert v. Ferris Faculty Ass'n-MEA-NEA*, 556 F.Supp. 309 (W.D.Mich.1982). Finally, on October 22, 1984, the plaintiffs and the NEA stipulated that the NEA would refund all pre-1981-1982 service fees in exchange for limited discovery and litigation solely as to the 1981-1982 school year. The court finds that this stipulation would have been meaningless had the parties thought that the NEA had waived its right to all service fees. Since plaintiffs offer no other evidence suggesting that the NEA has made such a waiver, the court expressly finds that the NEA has not waived its right to collect service fees from plaintiffs for any fiscal years from 1981-1982 forward.

From the evidence received at trial, the court finds that the NEA can be broken down functionally into 12 areas. Eight of those areas involve so-called direct expenditures: Affiliate Services, Communications, Government Relations, Human and Civil Rights, Instruction and Professional Development, Legal Services, Political Affairs, and

Research. The remaining four areas, Administration, Business and Finance, Data Processing, and Governance, can be characterized as administrative or overhead. A brief description of the role of those areas and their actual expenditures in 1981-1982 is taken from union defendants' exhibits EEEE, FFFF and GGGG.

The Affiliate Services area operates to deliver NEA programs to NEA affiliates in the field. This is accomplished through six NEA Regional Offices. The total 1981-1982 Affiliate Services expenditures of $27,498,475 are further broken down into the following eight general areas: membership promotion and recruitment, $2,042,482; leadership training, $1,177,354; staff training, $1,010,138; coordination of services to affiliates, $3,529,672; bargaining and negotiation support, $1,171,938; field support for legislation and political affairs, $778,792; organizing, $4,615,088; and UniServ, $13,173,011.

The mission of the Communications area is to provide internal and external communications to NEA leaders, members, potential members and the general public. Internal communication was effected primarily through the NEA's various publications. External communication was accomplished through the media. The Communications area expended a total of $7,904,237 in 1981-1982, $5,846,892 internally and $2,057,344 externally.

Through the Government Relations area in 1981-1982, the NEA lobbied Congress on various issues related to employment and public education, monitored the activities of the Reagan Administration and several federal agencies, coordinated its efforts regarding passage of the Equal Rights Amendment, and communicated pertinent information to the state and local affiliates. The Governmental Relations area spent $1,652,718 on its attempts to achieve federal legislation and $433,435 on monitoring the administration and agencies for a total of $2,086,153.

The Human and Civil Rights area is sometimes referred to as Teacher Rights. The area is responsible for developing and implementing programs to prevent violations of teachers' rights, to protect and defend teachers whose rights have been violated, and to increase the involvement of minorities and women in the NEA. In 1981-1982, the area expended $255,751 on programs and litigation to protect teacher rights, $649,692 to enhance civil rights in education, $474,797 to increase minority involvement, and $234,232 to enhance equal educational opportunity, for a total of $1,614,472.

The Instruction and Professional Development (IPD) area is responsible for assisting affiliates with the development and application of guidelines for licensure, accreditation and continuing education for teachers. It also provides training to teachers in numerous areas of professional and educational interest. With respect to higher education, it assists faculty in implementing guidelines to evaluate governance, tenure and academic freedom. The area's total 1981-1982 expenditures of $2,275,960 were divided as follows: professional excellence, $514,054; organizational excellence through IPD, $856,534; integrity in educational opportunities, $546,743; and national recognition for quality education, teaching and critical educational issues, $358,629.

The Legal Services area offers a variety of programs and activities designed to assist and protect members and affiliates in all types of legal matters. The area operates a unified legal services program, a subsistence loan program, offers liability insurance and assists states in establishing attorney referral programs. Total area expenditures for 1981-1982 were $7,174,718.

The Political Affairs area concentrates primarily on administering NEA-PAC and fostering individual involvement in campaigning and electoral politics. The area spent a total of $1,081,629 in 1981-1982. The NEA has agreed that this figure is nonchargeable.

The final area involving "direct" expenditures is Research. This area is responsible for gathering and analyzing data, developing and conducting surveys, providing consultant and technical services, and training affiliated staff and elected leaders. In 1981-1982, the Research area expended $1,377,730 on the research computer network, $284,814 on collective bargaining/benefits services, $320,771 on information services, $1,024,908 on surveys, and $548,695 on studies/special projects, for a total of $3,556,918.

The four areas responsible for administrative and overhead expenses, Administration, Business and Finance, Data Processing, and Governance, had total 1981-1982 expenditures of $17,227,585. Of particular note was the $1,408,670 spent by Governance on the 1982 NEA Representative Assembly.

As union defendants' exhibit L reflects, the NEA also computed its 1981-1982 political activity rebate by having its departmental area directors estimate the approximate percentage of time that staffers in their area spent on nonchargeable activity. Although certain NEA employees do keep daily time sheets of their activities, it is unclear to what extent this data was reviewed in making the nonchargeable estimates. Further, to a greater degree than the MEA, the NEA introduced into evidence data regarding actual expenditures for the fiscal year 1981-1982, as opposed to a mere budget. *See* union defendants' exhibits EEEE (financial statement as of August 31, 1982 with auditor's report) and GGGG (1981-1982 program accomplishment report). While the program accomplishment

report is the type of hard data necessary in litigation such as this to establish chargeable expenditures, very little relevant interpretive testimony was offered to clarify the individual line items.

II. ANALYSIS AND LEGAL CONCLUSIONS

A. Chargeable Expenditures

1. Applicable Law

In 1973, the Michigan legislature amended its Public Employment Relations Act (PERA) to expressly authorize an agency shop system for union representation of public employees.[8] The constitutionality of the amended Act was

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[8]In that regard, Mich.Comp.Laws § 423.210 now provides in pertinent part:

> (1) It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9 [§ 423.209]; (b) to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization: Provided, That a public employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay; (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: *Provided further, That nothing in this act or any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 [§ 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. . . .*
>
> (2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to

challenged in the Michigan courts and ultimately appealed to the United States Supreme Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court held that an agency shop clause in a collective bargaining agreement between the Board of Education and the Detroit Federation of Teachers did not violate the first and fourteenth amendment rights of freedom of expression and association of non-union members of the bargaining unit who were required to pay service fees, at least insofar as the service fees were used to finance union expenditures for the purposes of "collective bargaining, contract administration, and grievance adjustment." *Id.* at 225-26, 97 S.Ct. at 1794. The Court also indicated that a service fee payor could not be required to fund union expenditures for political activity or ideological causes not germane to the union's duties as collective bargaining representative. *Id.* at 235-36, 97 S.Ct. at 1799-1800.

The *Abood* decision was not the first time that the Supreme Court had the opportunity to pass on the constitutional implications of union security provisions such as the agency shop. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed.2d 1112 (1956), the Court held that section 2, Eleventh, of the Railway Labor Act (RLA) as amended, 45 U.S.C. § 152, Eleventh, which authorized railway carriers and labor organizations acting as exclusive representatives of bargaining units to enter into union shop agreements,[9] did not violate the first and

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the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. [Emphasis added.]

[9]A union shop arrangement, as opposed to an agency shop, allows the employer to hire freely but all employees must join the union within a specified period of time. *See generally Developments in the Law—Public Employment*, 97 Harv.L.Rev. 1611, 1726 n. 1 (1984)

fifth amendments to the Constitution. The Court acknowledged the congressional intent of eliminating the free rider problem by requiring those who enjoy the benefits of union representation to contribute to the support of the union. 351 U.S. at 231, 76 S.Ct. at 717. Further, the Court stated that such congressional action was a valid exercise of power under the commerce clause given the legitimate governmental interest in industrial peace and stabilized labor-management relations. *Id.* at 233-34, 76 S.Ct. at 718-19.

One question left undecided by the *Hanson* Court—whether the required payment of union dues in a union shop could be used to force support of ideological causes or political candidates, *see id.* at 238, 76 S.Ct. at 721—was decided several years later in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). *Street* also involved a union shop under section 2, Eleventh of the RLA. In that case, the union had expended union funds, over the objection of dissenting union members, in the support of political causes to which plaintiff-dissenters were opposed. The Court held that the union's use of an employee's money, over his objection, "to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Id.* at 768, 81 S.Ct. at 1800. Construing the RLA in such a way as to avoid constitutional issues, the Court held that the statute

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[hereinafter cited as *Developments*]. Nevertheless, under federal law, a union shop is the practical equivalent of an agency shop because the requirement of union membership is interpreted as the requirement of payment of fees and dues. *Abood*, 431 U.S. at 217 n. 10, 97 S.Ct. at 1790 n. 10 (citing *NLRB v. General Motors*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1459, 10 L.Ed.2d 670 (1963)).

did not give the union this power. *Id.* at 768-69, 81 S.Ct. at 1799-1800.

A third case concerning the RLA, *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), described the burden of persuasion in cases where objecting nonmembers challenge the chargeable service fee:

> Since the unions possess the facts and records from which the proportion of [nonchargeable] political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of [nonchargeable] political activities.

Id. at 122, 83 S.Ct. at 1163-64. This language was quoted with approval in *Abood*, 431 U.S. at 239 n. 40, 97 S.Ct. at 1802 n. 40.

Subsequent to *Abood*, the Supreme Court decided yet another case involving section 2, Eleventh of the RLA. In *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court went beyond *Hanson, Street, Allen* and *Abood* and actually undertook to define the line between chargeable and nonchargeable union expenditures under the RLA. Applying the test of "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" *id.* at 448, 104 S.Ct. at 1892, the Court addressed six particular types of union expenditures: conventions, social activities, publications, organizing, litigation, and death benefits. In making this inquiry, however, the Court first construed the applicable provisions of the RLA in an attempt to avoid unnecessary constitutional issues. *See id.* at 444-45, 104 S.Ct. at 1890-91.

With respect to the first two categories of union expenditures, conventions and social activities, the Court held that the RLA allowed the expenditures to be charged to objecting service fee payors. The Court stated that periodic, national union conventions at which union officers are elected and overall union policies, including bargaining goals and priorities, are set, are necessary for the union to "maintain its corporate and associational existence." *Id.* at 448, 104 S.Ct. at 1892. For this reason, the Court held that conventions are necessary in order that the union may carry out its statutory function as exclusive representative, and therefore, the entire cost of such conventions are chargeable under the RLA. *Id.* at 448-49, 104 S.Ct. at 1892-93. As to the .7% of total union expenditures spent on social activities, the Court noted that these functions were formally open to nonmember employees and were otherwise important to the membership because they helped maintain "harmonious working relationships." *Id.* at 449, 104 S.Ct. at 1892-93. Although conceding that social expenditures were not central to the union's statutory function, the Court refused to hold that such *de minimus* expenditures were beyond the scope of the RLA. *Id.* at 449-50, 104 S.Ct. at 1893.

The Court also considered a portion of the amount of money expended by the union on publications sent to all employees—members and nonmembers alike—to be chargeable to objecting nonmembers. Such publications, the Court observed, are the union's primary means of reporting on its activities and communicating with represented employees on issues of mutual concern. The Court

held that the cost of such publications is chargeable under the RLA to the proportional extent that the publications report on chargeable activities. *Id.* at 450-51, 104 S.Ct. at 1893-94. Presumably, this calculation should be made on a column inch basis, *see id.* at 450, 104 S.Ct. at 1893; but absolute precision in the calculation is not required. *Allen*, 373 U.S. at 122, 83 S.Ct. at 1163.

Since the Court found that these three expenditures were chargeable under the RLA, it also had to consider whether charging for the same activities increased the degree of infringement of the first amendment rights of the objecting employees beyond that impingement inherent in the union shop and, if so, whether the additional infringement is adequately justified by the governmental interest in labor peace. As to the expenditures for social activities, the Court held that the only communicative aspect of the compelled subsidy was the fact that such activities were sponsored by the union—a fact that was already taken into consideration in allowing the union shop. Therefore, forcing the nonmember to subsidize such social activities in no way increased the degree of infringement of first amendment rights. *Id.* 466 U.S. at 456, 104 S.Ct. at 1896.

The Court recognized that conventions and publications presented more serious questions of communicative content. However, the small additional infringement of first amendment rights was justified by the legitimate governmental interest. The Court added that "[t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in the use of compelled funds. 'The furtherance of the common cause leaves some leeway for the leadership of the group.' " *Id.* (quoting *Abood*, 431 U.S. at 222-223, 97 S.Ct. at 1793).

There was no explanation for the discrepancy in holdings that the union could charge for the entire cost of conventions under the statute and the first amendment, but only for the portion of union publications relating to chargeable activities. It is beyond peradventure that aspects of union conventions are devoted to activities considered nonchargeable under the Court's definition. Nevertheless, Justice Powell's separate Opinion clearly pointed out this anomaly so it cannot be argued that the Court's holding regarding the expenses of the convention was anything less than deliberate. *See id.* at 457, 104 S.Ct. at 1897 (Powell, J., dissenting in part).

The Court held that the union's expenditures for organizing efforts were completely nonchargeable under the RLA. Although organizing efforts outside the bargaining unit arguably are undertaken to make the union stronger and to bolster its bargaining ability, the connection between such efforts and collective bargaining was thought to be too tenuous. *Id.* at 451, 104 S.Ct. at 1893. With respect to intra-unit organizing, the Court stated flatly that "it would be perverse to read [the RLA] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Id.* at 452 n. 13, 104 S.Ct. at 1894 n. 13.

In addressing the union's expenses related to litigation, the Court construed the RLA to impose two qualifiers on chargeability. First, it held that only litigation before agencies and in courts that "concerns bargaining unit employees and is normally conducted by the exclusive representative" is chargeable. *Id.* at 453, 104 S.Ct. at 1895. This includes, but is not limited to, litigation incident to bargaining, contract administration, grievance and dispute resolution, fair representation matters and inter-union jurisdictional disputes. The second qualifier to chargeability under the statute is that litigation expenses must be broken down on a unit-by-unit basis. *Id.* This

latter requirement is unique to litigation expenditures in the *Ellis* Opinion. Indeed, the requirement of a unit-by-unit breakdown of chargeable expenditures has never, to my knowledge, even been suggested in any of the Supreme Court's prior (or subsequent) union/agency shop decisions. Nevertheless, the Court offered no explanation of why the RLA required such a cost allocation and no rationale of why this type of allocation was appropriate to litigation expenses and no others.

With respect to the issue of the union's payment of death benefits to designated beneficiaries of deceased employees, the court of appeals in *Ellis* had held that since insurance benefits are a mandatory subject of bargaining, the union's decision to insure its own members rather than seek benefits from the employer was a legitimate tactical decision, "germane to the work of the union within the realm of collective bargaining." 685 F.2d 1065, 1074 (9th Cir.1982). The Supreme Court did not reach the issue because, at the time of the Opinion, the union was no longer the exclusive representative of the unit and the objecting nonmembers were no longer participating in the benefit system. The Court did, however, rule that the objecting nonmembers were not equitably entitled to a refund of their past contributions because they had enjoyed the benefit of insurance coverage. *Id.* at 454-55, 104 S.Ct. at 1895-96.

At least with regard to political or ideological expenditures of the union, there is a fundamental distinction between cases like *Hanson, Street, Allen* and *Ellis* involving private sector employment, and those like *Abood* and the case at bar involving public sector employment. The *Abood* Court recognized that this distinction is not to be found in the nature of the employee or in the work performed, but rather in the character of the employer. 431 U.S. at 229-30, 97 S.Ct. at 1796-97 (citing Summers, *Public Sector Bargaining: Problems of Governmental*

Decisionmaking, 44 U.Cin.L.Rev. 669, 670 (1975)). While *Street* and *Allen* appear to have settled the question whether political or ideological expenditures by the union can ever be chargeable to an objecting member of a private sector bargaining unit, the same reasoning does not necessarily apply in the public sector where the legislature and other political bodies are integrally involved in the collective bargaining process or otherwise directly impact on the terms and conditions of employment. *See Developments, supra* note 9, at 1732-33. The *Abood* Court did not rule on this point, but it nevertheless framed the issues:

> There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in *Street*, as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.

431 U.S. at 236, 97 S.Ct. at 1800 (footnote omitted).

The leading post-*Abood* federal case on political expenditures by public sector unions is *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985). In that case, public employee plaintiffs challenged, *inter alia*, portions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1 *et seq.*, which allowed agency shop arrangements and authorized the use of service fees for support of certain lobbying activities directly related to collective bargaining, contract administration or the terms and conditions of employment, but not partisan political

activities or ideological causes only incidentally related to such functions. *Id.* 34:13A-5.5(b) and (c). Plaintiffs argued that such forced political support violated the first and fourteenth amendments. After a thorough discussion of the Supreme Court's RLA cases and the *Abood* decision, concentrating on the distinctive nature of public sector employment relations, the *Robinson* court concluded:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication from any other form of union activity that may be financed with representation fees.

741 F.2d at 609. *See also Cumero v. Public Employment Relations Board*, 167 Cal.App.3d 131, 145-46, 213 Cal.Rptr. 326, 336-37 (1985); *cf. Beck v. Communications Workers of America*, 776 F.2d 1187, 1210-11 & n. 31 (4th Cir.1985) (lobbying expenditures not chargeable in private sector union context).

Although the Third Circuit's decision in *Robinson* is not controlling in the instant case, I find the reasoning in that opinion very persuasive. Further, although the New Jersey statute at issue in *Robinson* provided explicitly that certain lobbying expenditures were chargeable by the union, and Michigan's PERA is silent on this issue, I do not think that the two statutes can fairly be distinguished in this respect. It appears that the New Jersey and Michigan legislatures had similar intents when passing their respective amendatory statutes—to foster the roles of exclusive representatives in the public employment sector and to promote labor peace by eliminating, to the greatest extent possible, the problem of "free riders" in the collective bargaining unit. *Compare Robinson*, 741 F.2d at 609-10 *with* Mich.Comp. Laws § 423.210(2) *and Abood*, 431 U.S. at 224, 97 S.Ct. at 1793 (discussing PERA).

431 U.S. at 224, 97 S.Ct. at 1793 (discussing PERA). Unlike PERA, the New Jersey statute was amended after, and with the benefit of, the Supreme Court's decision in *Abood*. If there is a distinction to be made between the two statutes, it is that PERA sought to make the full equivalent of ordinary union dues chargeable to the service fee payor while the New Jersey statute provided that the service fee could not exceed 85% of ordinary dues. *See* N.J.S.A. 34:13A-5.5(b). Therefore, it cannot be argued that the Michigan legislature did not intend for service fee payors in an agency shop to contribute to the cost of the union's lobbying activities to the extent that the activities are germane to the union's duties as bargaining representative and the compelled contribution is otherwise constitutionally permissible. In accordance with the foregoing discussion, I find that such lobbying expenditures are constitutionally chargeable to public sector service fee payors under PERA.

Another issue in contention is public sector organizing. As I have already discussed, the Supreme Court held in *Ellis* that expenditures related to organizing, both in and out of the bargaining unit, are nonchargeable under the RLA. The union defendants in the case at bar seek to distinguish *Ellis* on three grounds. First, they restate the importance of the distinction between public and private unions, and especially the inability of school employee unions in Michigan to engage in a lawful strike. These defendants argue that the relative strength of a public bargaining unit in this case is more directly connected to their ability to collectively bargain than in the *Ellis*, private sector union context because the threat of an illegal strike will be taken more seriously by the governmental employer if it knows that a greater percentage of the employees will support the strike. Secondly, the union defendants argue that the majority of the organizing conducted by them in 1981-1982 was aimed at school support personnel—not teachers. In other words, the unions were organizing

within the bargaining unit but not attempting to convince objecting nonmember teachers, such as the instant plaintiffs, to become members. *Cf. Ellis,* 466 U.S. at 451-52 & n. 13, 104 S.Ct. at 1893-94 & n. 13. Lastly, the union defendants distinguish the *Ellis* decision on this point because the Court's holding with respect to organizing was made under the RLA, not under the Constitution.

While these defendants' arguments regarding the differences between the organizing undertaken in the case at bar and that considered in *Ellis* are not entirely unpersuasive, this court is not convinced that the differences are so compelling as to justify a contrary conclusion. The *Ellis* Court stated, in unambiguous language, that it considered organizing efforts "aimed toward a stronger union" to have only an "attenuated connection with collective bargaining." *Id.* at 451, 104 S.Ct. at 1894. This court is satisfied that the constitutional standard of *Abood* requires a more direct connection. Accordingly, I hold that the union defendants' expenditures for organizing are not chargeable to the plaintiffs.

The final issue in contention is litigation expenses. As I have already stated, the *Ellis* Court construed the RLA in such a way as to require such expenses to be chargeable to service fee payors only where the litigation was related to the union's duties as exclusive representative *and* where it involved members of the service fee payors' bargaining unit. I fully recognize that the *Ellis* Court engaged in statutory interpretation in an effort to avoid the constitutional issue. By contrast, the constitutional question of the chargeability of public sector litigation expenses is squarely before this court. Though *Ellis* is not binding on this issue, the Supreme Court's statutory rationale ordinarily would be accorded the greatest persuasive weight in analyzing the constitutional requirements. However, I am deeply troubled by the complete lack of rationale offered for the *Ellis* requirement of a unit-by-unit breakdown. I

am also very concerned about the adverse implications of according constitutional significance to this particular statutory requirement and applying the new rule to the facts of the instant case.

The inconsistency of requiring only litigation expenses to be broken down by bargaining unit in determining chargeability is readily apparent. Much if not all litigation that is related to the union's duties as exclusive representative addresses issues of shared concern. *See Developments, supra* note 9, at 1731. Furthermore, since unions operate on a cost-sharing basis, extraordinary expenses incurred by any one unit in any given year are spread out over all units represented by the union. This cooperative cross-funding enables the union to effectively represent individual members and units in hard cases that will have an impact on the greater whole while maintaining stable dues levels. Since dues levels are incorporated as benchmarks for service fees in union/agency shop statutes, *see, e.g.,* 45 U.S.C. § 152, Eleventh; Mich.Comp.Laws § 423.210; N.J.S.A. 34:13A-5.5(b), service fees may not exceed ordinary union dues even in a situation where a disproportionately high percentage of the union's litigation expenditures for a given period are directly attributable to a particular bargaining unit. In other words, a unit-by-unit breakdown of litigation expenses, or any other expenditure, in a determination of the chargeable service fee—even assuming such a breakdown were possible or practicable from a cost effectiveness standpoint—would *logically* lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units. Nevertheless, because most union/agency shop statutes tie the amount of the service fee to the amount of ordinary union dues, service fees can never legally exceed dues. Therefore, a unit-by-unit breakdown of chargeable expenditures would only exacerbate the free rider problem and thereby frustrate the governmental interest that the Court

has repeatedly recognized lies at the heart of statutes authorizing union/agency shops.

In addition to these general legal problems, imposing a constitutional requirement of a unit-by-unit breakdown of litigation (or any other) expenses would create an unreasonable and unmanageable administrative burden on the instant union defendants. The MEA has hundreds of affiliated local bargaining units; the NEA has thousands. Assuming *arguendo* that these bodies were able to break-out discrete expenses by bargaining unit—an assumption that is not warranted by the facts at trial—I have little doubt that the marginal revenue received from service fee payors would not justify the cost of modifying the existing accounting systems to accommodate the requirement. Thus, from a cost-benefit standpoint, a decree requiring a unit-by-unit breakdown of chargeable litigation expenses would be "likely to infringe the union's right to expend *uniform exactions* under the [agency] shop agreement in support of activities germane to collective bargaining . . . ." *Allen*, 373 U.S. at 122, 83 S.Ct. at 1164 (*cited in Abood*, 431 U.S. at 239 n. 40, 97 S.Ct. at 1802 n. 40.) In my opinion, such an extreme decree is not warranted by the Constitution or by logic under the facts of the case at bar.

2. Analysis

(a) Ferris Faculty Association-MEA-NEA

In reference to the stipulated 1981-1982 expenditures of the FFA listed in Appendix A, I conclude that the bargaining related expenses, the expenses associated with contract ratification and the negotiations training workshop, and arbitration fees, totalling $4,788.77, are unquestionably chargeable to plaintiffs. I similarly find that the $1,026.84 expended on the MEA and NEA Representative Assemblies is fully chargeable under *Ellis*. Plaintiffs seek to distinguish the *Ellis* decision on this point because the

instant conventions were those of "affiliated" unions and not the actual exclusive bargaining representative. However, the legal relationship between local bargaining unit representatives such as the FFA and their state and national affiliates such as the MEA and NEA is a matter of statutory interpretation. The Michigan Employment Relations Commission (MERC), the state administrative agency with the primary responsibility for contruing the requirements of PERA, has repeatedly found that "an affiliated bargaining unit is a different entity from a local, independent unit." *In re Bridgeport Spaulding Community Schools*, Nos. C79-J-353 & CU79 J-51, slip op. at 34 (A.L.J. Op. Feb. 24, 1986) (citing cases). Furthermore, the MERC Administrative Law Judge in *Bridgeport Spaulding* explicitly held that since the "union as affiliated is the exclusive representative" under PERA, the objecting service fee payor can be charged for the cost of the MEA and NEA Representative Assemblies under *Ellis*. *Id*. at 40. By the same rationale, the $666.42 spent by the FFA in sending representatives to the 13E coordinating council, where bargaining strategies and representational policies are developed for the UniServ unit composed of the Ferris State College and Central Michigan University bargaining units, is chargeable to plaintiffs.

The FFA lobbying expenditures were divided into three categories. I found that the PPE program was directed at securing funding for public education in Michigan. In a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying is directly related to the statutory duties of the exclusive representative. *See Abood, supra; Robinson, supra.* Therefore, the $149.99 spent on the PPE Conference is chargeable to plaintiffs. As to the $102.69 expended by the FFA on lobbying the state legislature and the MEA Legislative Dinner, the union defendants failed to meet their burden of establishing that the nature of the issues concerned

were chargeable. While I do not doubt that funding and other chargeable issues were at least partially covered in these two expenditures, the unions have conceded that they also engaged in other ideological lobbying that is not so clearly chargeable under the *Abood/Robinson* rationale. Since the burden remains always with the union defendant to establish chargeability, I must conclude that none of the $102.69 spent on unexplained lobbying is chargeable to the plaintiffs.

With respect to the expenditures related to the contract negotiations difficulties encountered in 1981-1982, including those for the "crisis center/strike headquarters," informational picketing, advertising, and rent for membership meetings, I think the fact that the FFA did not engage in an illegal strike is of paramount importance. The question whether any of these expenditures may have been chargeable had a strike occurred is one that this court need not address. The "crisis center" never became a "strike headquarters" but still served a useful purpose in the negotiations process. The rent paid to hold membership meetings was necessary to keep the employees of the bargaining unit apprised of the progress of the negotiations and to get feedback on the members' demands. Likewise, the expenditures for disbursing information to the public that was favorable to the bargaining unit's position is well within the realm of reasonable and legal bargaining tactics in the public sector labor context. Therefore, I hold that the entire $4,804.00 expended by the FFA for these purposes is chargeable to the plaintiffs.

The final direct expenditure made by the FFA during 1981-1982 was the $2,500.00 no-interest loan made to support an affiliated local bargaining unit in a strike. The parties have stipulated that this loan was repaid in full in a subsequent fiscal year. I conclude that inasmuch as strikes by public employees are illegal under Michigan law, this expenditure was made in support of an illegal activity,

and hence, cannot be charged to the objecting nonmembers of the bargaining unit. I note only as an aside that had the loan proceeds been recouped during the 1981-1982 fiscal year and then re-expended on a chargeable activity, a different issue would have been presented. Since that is not the case, however, I will leave that issue for another court and another day.

In accordance with this discussion, I find that the FFA has established that 81% of its direct expenditures for 1981-1982 are chargeable to the plaintiffs. Pursuant to the aforementioned stipulation, that same percentage will be applied to the local's administrative expenses. In computing the chargeable service fee for the FFA for that year, the ordinary union member's dues amount, $24.80, is multiplied by the percentage of the total expenditures that are considered chargeable, in this case 81%. The resulting service fee to which the FFA is entitled from the plaintiffs for 1981-1982 is $20.09.

(b) Michigan Education Association

The MEA's theory of this case was that it could establish its chargeable service fee by identifying estimated percentages of time spent on admittedly nonchargeable activity, subtracting the resulting percentage from the overall budgeted expenditures for the year in question, and considering the remaining portion budgeted expenditures chargeable to the plaintiffs. The presentation of evidence at trial by the MEA was consistent with this theory. However, after reviewing the applicable Supreme Court decisions on point, I conclude that the evidentiary record created by the MEA in its case in chief is deficient in two respects.

As an initial proposition, it is no longer open to question that in establishing a service fee a union must identify the expenditures that it made in relation to

activities that are germane to duties as exclusive representative. *See Chicago Teachers Union v. Hudson*, ___ U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232, 247 (1986). The percentage of the overall union expenditures that the union establishes as chargeable is thus determined and that same percentage is applied to the amount of ordinary union dues, resulting in a constitutionally chargeable service fee.

It is not a truism, as the union defendants would suggest, that an admission of nonchargeable activity and time estimates is, by implication, competent proof of chargeable activity and time. As the *Hudson* Opinion explained, the first amendment requires that the union adequately disclose the nature of the activities for which it seeks to charge the objecting service fee payor. Since the burden of persuasion on the issue of the percentage of chargeable expenditures remains always with the union, and since the union possesses the facts and records from which this percentage is to be calculated, *see Allen*, 373 U.S. at 122, 83 S.Ct. at 1163, the union cannot shift the burden to the plaintiffs to cull through the unidentified but assumed chargeable activities in search of discrepancies. This type of erroneous burden shifting is not only unfair to service fee payors who object on the grounds of legitimate first amendment rights but also inevitably leads to the unmanageable and unnecessary pretrial discovery and attendant trial difficulties experienced by the parties and the court in the instant case.

The second deficiency in the evidentiary record created by the MEA regarding its service fee for 1981-1982 was with the basis for their calculations. As I have already described, the MEA relied primarily on "budgeted" figures instead of evidence of actual "expenditures." The Supreme Court has consistently held, at least since the 1963 *Allen* decision, that it is union expenditures that are in issue. While *Allen* also stated that "absolute

continually observed, *see Hudson*, 106 S.Ct. at 1076 n. 18, 89 L.Ed.2d at 247 n. 18, the question remains what degree of inaccuracy is tolerable. Under the particular circumstances of this case, I hold that the introduction of budgeted expenditures is not competent proof of actual expenditures.

Although this case was tried in 1986, the proofs at trial related exclusively to the 1981-1982 fiscal year. Therefore, this is not a situation in which the union was prevented by time constraints from marshalling its financial data regarding expenditures. To the extent that the union's then-existing accounting system did not enable it to breakdown chargeable from nonchargeable expenditures, it might still have identified major categories of chargeable expenditures with reasonable precision. By relying primarily on budgeted expenditures, which often vary considerably from actual expenditures when individual line items are compared, the court would be forced to speculate as to the accuracy of individual line items in the hopes that variables would average out in the end. This problem is, of course, exacerbated by the previously described differing budget formats between union defendants' exhibits A and G (based on revised budget) and plaintiffs' exhibit 613 (based on reorganized budget). Such speculation by the court, acting as the finder of fact, is impermissible. While a limited degree of imprecision is tolerable in calculating a service fee, the reliance on budgeted as opposed to actual expenditures under the circumstances of the instant case is too imprecise.

In reference to the actual expenditures set forth in the MEA's schedule of expenses for 1981-1982, exhibit 613, I find very few items which I can categorize as completely chargeable absent further relevant explanation. Two such expenses are the $212,959 for the MEA Representative Assembly and the $118,216 for the NEA Convention. Both expenditures were incurred by the Program Develop-

Assembly and the $118,216 for the NEA Convention. Both expenditures were incurred by the Program Development and Support division which is classified as a "direct expenditure" division. Both are clearly, chargeable to plaintiffs under *Ellis*.

The MEA's Program Services division, also a "direct expenditure" division, expended a total of $254,092 on the union's primary publication available to all bargaining unit members—the *Teachers' Voice*. Under *Ellis*, this expense is chargeable to the same extent that the publication reports on activity that is chargeable. All issues of Volume 59 of the *Teacher's Voice* for 1981-1982 were admitted into evidence. *See* plaintiffs' composite exhibit 612. Furthermore, plaintiffs' introduced a "marked copy" of a content analysis study which describes the nature of the contents of Volume 59 on a column inch basis. *See* plaintiffs' exhibit 594. I have reviewed both exhibits exhaustively and while I find the format and mathematical computations of exhibit 594 helpful, I have made an independent determination of the chargeable content of exhibit 612. My analysis reveals that 81.6% of Volume 59 of the *Teacher's Voice* relates to chargeable activity (see Appendix B for calculation). Therefore, of the $254,092 expended in 1981-1982 on that publication, 81.6% or $207,339.07 is chargeable to plaintiffs.

Due to the paucity of relevant evidence, I am unable to identify with any acceptable degree of accuracy any further discrete chargeable expenditures of the MEA for 1981-1982. I hasten to add that this should not be taken as an indication that the MEA did not engage in significant activity of a chargeable nature. This holding merely reflects my understanding of the current status of the law in this area and the union's failure to structure its proofs in accord with that law.

The sum of the three chargeable MEA expenditures identified above is $538,514.07. The total 1981-1982 MEA expenditures for the three "direct expenditure" divisions under the reorganized budget—Program Development and Support, UniServ, and Program Services—was $15,766,674. Therefore, considering the stipulation regarding direct and administrative expenditures, the proven chargeable percentage is 3.4%. The reduced service fee chargeable to plaintiffs in the instant case and for the 1981-1982 fiscal year is 3.4% of the ordinary MEA dues of $211.20, or $7.18.

(c) National Education Association

Like the MEA, the evidentiary presentation of the NEA was geared toward estimating the percentage of nonchargeable time and activities of NEA staffers. In contrast to the MEA, however, at least two exhibits were introduced which described in some detail the actual expenditures of the NEA for 1981-1982, *see* union defendants' exhibit EEEE and GGGG, the latter of which breaks down expenditures by programs or activities performed by the various departments or areas. Thus, while the court's calculation of the NEA's chargeable service fee is not aided by most of the testimony of NEA witnesses or by union defendants' exhibit L, which is a memorandum explaining the NEA's political activity rebate procedure and a compilation of memoranda from the various departmental areas estimating the nonchargeable percentages of time and activity, some discrete program expenditures are described in exhibit GGGG.

Due to the acknowledged partially ideological-political mission of the NEA, the vast majority of the identified program expenditures detailed in GGGG were either for a mix of chargeable and nonchargeable activity or were not sufficiently explained to determine their nature. Since there was very little testimony from NEA witnesses relat-

ing directly to this exhibit, the court has no clear way to break-out the chargeable from the nonchargeable in these mixed or ambiguous expenditures. Nevertheless, there are a few detailed expenditures that are exclusively for chargeable activity. With respect to these particular expenditures identified below, I hold that defendant NEA met its burden of persuasion that the program activity expenditure was properly chargeable.

Under the Affiliate Services area of exhibit GGGG, pp. 6-7, function 5.0 is entitled "Bargaining and Negotiation Support." Bargaining and negotiation expenses are the most easily identified chargeable amounts under any service fee standard. By reference to the columns for program description, "Program Accomplishment" and "Summary," it is clear to me that programs numbered 5.1, 5.2 and 5.3 identify chargeable activities. The total NEA expenditures for these three programs was $785,190. I do not consider the expenditure for program number 5.4 to be chargeable because it was partially in relation to job action situations. As I explained earlier in this opinion, whether certain expenditures for job actions are to be considered chargeable is a determination to be made on the basis of the particular fact situations. Since the total expenditures for program 5.4 was not sufficiently detailed by the NEA, I cannot consider any portion of it chargeable.

Under the Research area, pp. 39-41 of exhibit GGGG, function 2.0 is entitled "Collective Bargaining/Benefits Services." Again by reference to the first three columns, it is clear that programs 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 identify chargeable activities. Therefore, the entire $284,814 expended on this function is proportionately chargeable to plaintiffs. Also under the Research area, pp. 43-44, function 5.0 is entitled "Studies/Special Projects." Programs numbered 5.1 and 5.2 relate directly to studies of public school financing, an activity area that this

court considers chargeable. Therefore, the $395,801 expended on these two programs in 1981-1982 is proportionately chargeable to plaintiffs.

This short list exhausts the program expenditures in the eight so-called "direct expenditure" departmental areas of the NEA that this court can identify from the face of exhibit GGGG, other relevant exhibits and the sparse relevant testimony, as related exclusively to union activities that are clearly chargeable. The subtotal of the described chargeable program activity expenditures by "direct expenditure" areas is $1,465,805. This figure represents 2.75% of the total expenditure of $53,192,624 by the "direct expenditure" areas. While there are other program activities in the four "administrative expenditure" areas of Administration, Business and Finance, Data Processing, and Governance (*e.g.,* Administration program 1.5, and Governance function 1.0), the parties have stipulated to apply the same percentage of chargeable "direct" expenditures in determining the chargeable percentage for "administrative" expenditures.

In accordance with this discussion, I hold that the NEA has only established that 2.75% of its overall expenditures for 1981-1982 is proportionately chargeable to the plaintiffs. The NEA service fee that plaintiffs are required to pay for that year is 2.75% of the ordinary NEA dues of $48, or $1.32.

B. Constitutionally Required Procedure

1. Applicable Law

Until relatively recently, the law concerning the procedures to be used by unions in determining service fees in an agency or union shop was in a constant state of flux. The procedural problem is of fundamental importance because of the strong but conflicting public and

private interests involved. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800.

In the early union shop decisions interpreting the requirements of the RLA, the Supreme Court focused on the duty of the dissenting member to object to political uses of his monies and speculated as to appropriate remedies for proven violations. In *Street*, the Court indicated that "dissent is not to be presumed," and at least implied that an objector would have to specify which specific political activities or causes he or she objected to. 367 U.S. at 774-75, 81 S.Ct. at 1802-03. The *Street* Opinion also suggested that an appropriate remedy might be an order to the union to rebate portions of service fees improperly collected and expended. *Id.* at 775, 81 S.Ct. at 1803. However, the Court made clear that since the objecting employees' "grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union shop agreement by the mere collection of funds," an injunction relieving objectors of all money due under the union shop agreement was inappropriate. *Id.* at 771, 81 S.Ct. at 1801.

Two Terms later in *Allen*, the Court clarified its intent that objectors need only state their objection to the expenditure of their service fees for *any* political purpose; "[i]t would be impractical to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects." 373 U.S. at 118, 83 S.Ct. at 1162. The *Allen* Court stressed that the burden of proving the chargeable percentage rests fairly with the union inasmuch as the union, and not the employee, possesses the relevant facts and records. *Id.* at 122, 83 S.Ct. at 1163.

Lastly, in framing relief, the Court suggested that the union reduce future service fees from objectors by the amount of the past rebate and encouraged the union to adopt an "internal union remedy" to handle objections in years to come. *Id.*

Subsequently, in the *Abood* decision, the Court stated that the statutory protections for objectors available under the RLA were also required by the first and fourteenth amendment protections of freedom of speech and association. 431 U.S. at 233-34, 97 S.Ct. at 1798-99. Because the case came to the Court without a properly developed factual record, it had no specific remedy to review. Nevertheless, the court did suggest that a newly adopted internal union procedure involving rebate calculations made in the first instance by the union officials but ultimately subject to an impartial review might make further judicial proceedings unnecessary. *Id.* at 240-42 & nn. 41 and 45, 97 S.Ct. at 1802-03 & n.n. 41 and 45. In a separate opinion, an argument was proffered that "the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 244, 97 S.Ct. at 1804 (Stevens, J., concurring).

In the most recent RLA case, the Court held that a pure rebate scheme, first suggested in *Street*, "reduces but does not eliminate the statutory violation" where a portion of a service fee is used by the union for impermissible purposes. *Ellis*, 466 U.S. at 443-44, 104 S.Ct. at 1889-90. The Court analogized the pure rebate procedure to "an involuntary loan for purposes to which the employee objects." *Id.* at 444, 104 S.Ct. at 1889. The administrative convenience of such a procedure could not justify the statutory infringement given the availability of alternatives such as the "advance reduction of dues and/or interest

bearing escrow accounts, that place only the slightest additional burden, if any, on the union." *Id.*

Finally, in *Chicago Teachers Union v. Hudson*, ___ U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court solidified the constitutional requirements for union procedures in an agency shop. At the outset, the Court stated that procedural safeguards are necessary for two reasons:

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee—the individual whose first amendment rights are being affected—must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim.

Id. at ____, 106 S.Ct. at 1074, 89 L.Ed.2d at 244-45 (footnotes omitted). Given the important nature of the objecting employees' first amendment interests, the Court reaffirmed the need to assure that a dissenter's service fee is not used, even temporarily, for objectionable ideological causes not germane to the union's statutory function, and identified three additional constitutional requirements for a union's procedures for the collection of service fees. *Id.* at ___ - ____, 106 S.Ct. at 1075-78, 89 L.Ed.2d at 246-49.

The first additional requirement is that nonmembers must be given adequate information about the basis for the service fee calculation sufficient to enable them to assess the propriety of the calculation prior to the time for objection. The Court indicated that an adequate disclosure must identify and presumably justify the *chargeable* expenditures, rather than merely acknowledge nonchargeable expenditures and thereby treat the balance as chargeable by implication. *Id.* at ____ - ____, 106 S.Ct. at 1075-76, 89 L.Ed.2d at 246-47.

The second additional constitutional requirement is that the union procedure must "provide for a reasonably prompt decision by an impartial decisionmaker." *Id.* at ____, 106 S.Ct. at 1076, 89 L.Ed.2d at 247. While the Court acknowledged that as recently as *Abood* it had "suggested the desirability of an internal union remedy," *id.* n. 19, it was highly critical of the internal procedure of the Chicago Teachers' Union because the three steps of that procedure were entirely controlled by the union. *Id.* at ____, 106 S.Ct. at 1077, 89 L.Ed.2d at 248. The Court indicated that swift state judicial review of objections in the first instance was certainly one way to satisfy the constitutional requirement, but not the only way. *Id.* n. 20. A less burdensome method might be "expeditious arbitration . . . so long as the arbitrator's selection did not represent the union's unrestricted choice." *Id.* n. 21.

Finally, the Court addressed the union's self-imposed escrow of 100% of the objectors' service fees. While such an escrow eliminates the danger that a dissenter's funds might be temporarily used for objectional purposes, it alone does not render the procedure constitutional. The union must still provide an adequate explanation for the advance reduction of the service fee *and* provide for a reasonably prompt review by an impartial decisionmaker. *Id.* at ____ - ____, 106 S.Ct. at 1077-78, 89 L.Ed.2d at 248-49. The Court recognized that a compelled 100% escrow would deprive the union of immediate access to some funds to which it was "unquestionably entitled." *Id.* at ____, 106 S.Ct. at 1078, 89 L.Ed.2d at 249. Therefore, the Court stated that if the initial disclosure sufficiently identifies categories of expenditures that are clearly chargeable, fees proportional to those expenditures would not need to be escrowed. However, it held that both the identified chargeable expenditures and the limited escrow

figure itself would have to be verified by an independent audit of a certified public accountant. *Id.* at ____ & n. 23, 106 S.Ct. at 1078 & n. 23, 89 L.Ed.2d at 249 & n. 23. The Court's Opinion did not further explain this verification requirement. I must assume that it did not intend that the union's preliminary figures would have to be justifiable under generally accepted accounting principles. Such a requirement would be extraordinary given the Court's longstanding adherence to the *Allen* admonition that "[a]bsolute precision in the calculation . . . is not, of course, to be expected or required." 373 U.S. at 122, 83 S.Ct. at 1163 (*cited in Hudson*, at ____, 106 S.Ct. at 1076 n. 18, 89 L.Ed.2d at 247 n. 18).

2. Analysis

(a) Michigan Education Association and Ferris Faculty Association-MEA-NEA

The policies and procedures effective in 1982 for challenging the service fee calculations of the MEA and FFA are set forth in footnote 4, *supra*. In hindsight, it appears that these procedures were defective under the newly-announced *Hudson* analysis in many respects. Initially, the procedure offers no assurance that a dissenter's funds will not be temporarily used for an objectionable purpose. Secondly, an adequate disclosure of the basis for the reduced fee calculation was not made by the union prior to the time for objections. Further, after nonmembers requested such information, they were only given a copy of the approved budget for the year in question—this also constitutes inadequate information. Finally, the procedure did not provide a reasonably prompt decision by an impartial decisionmaker. Instead, the objector was forced to proceed through two levels of internal union review. This review seems pointless in a case where a nonmember objects to the use of his service fee for *any* nongermane ideological or political purpose.

Presumably the union has already decided what is and is not germane in computing the reduced fee. The final step of the procedure was "appropriate proceedings" in the Michigan Employment Relations Commission (MERC). However, while the *Hudson* Court stated that swift *judicial* review would suffice, "review" must logically be synonomous with "decision." In the instant case, the MERC Administrative Law Judge did not render her decision on related challenges to the MEA 1981-1982 reduced fee calculation until this year, just months shy of the instant opinion. While the federal court is certainly in no position to cast aspersions on the speed of MERC's decisionmaking process, this cannot be an example of the swift judicial review the Supreme Court had in mind.

I also have my doubts about the sufficiency of the revised MEA policies and procedures adopted this spring in the wake of the *Hudson* decision. *See* note 7, *supra*. First of all, the information disclosure is scheduled to be made by November 10, "or as soon thereafter as possible." Yet objections must be made on or before December 1. In the spirit of *Hudson*, I think it constitutionally required that nonmembers have *at least* two weeks after receipt of "adequate information about the basis for the proportionate share" in which to consider the information and make a reasoned decision whether to object. Furthermore, in order to assure that a dissenter's funds are not temporarily used for objectionable purposes, I hold alternatively that Ferris may not withhold agency funds from nonmembers' checks until after the time for objection has passed *or* that the union must place said funds in an independently controlled, interest bearing escrow account for said time period. As to the adequacy of the information disclosed, I cannot judge what I have not seen. I can only say that it will have to be a good deal more revealing than the evidence submitted at trial.

Assuming the preceding requirements are satisfied, the union must either deposit 100% of objectors' service fees into an independently controlled, interest bearing escrow account until such time as an impartial decisionmaker has rendered his final decision on the validity of the reduced fee calculation, *or* have their data for its reduced fee calculation and the data on which it bases its limited escrow verified by an independent audit by a certified public accountant. As a practical matter, I assume that such an audit would require some contemporaneous records detailing the activities on which MEA staffers spend their time. I would hope that such record keeping would not be so administratively burdensome as to compel the union to forego the service fees to which it is entitled. Certainly only major or substantial activities need be listed for purposes of satisfying the *Allen* accuracy requirements. In any event, since the union does not, according to the testimony received at trial, currently keep such time records, the 100% escrow option will likely be necessary for the time being.

Further, the court will need some assurance that the procedure provides for a reasonably prompt decision by an impartial decisionmaker. Even assuming that the union could secure MERC review of the reduced fee calculation on its own behalf and in the absence of a charging party, I hold that any decision that is not handed down before the end of the relevant fiscal year or soon thereafter is not "reasonably prompt." For these reasons, the union might be wise to secure an independent arbitrator, neutrally selected from a state-approved list of labor arbitrators. The MERC proceedings could then be more appropriately used in challenges to the final reduced fee amount after the relevant fiscal year when information on final expenditures for that year is available.

Finally, the MEA's revised policy and procedure differs from the original policy and procedure in note 4, *supra*, in

that it does not, by its own terms, apply to amounts retained by local affiliates such as the FFA. This may be an oversight, or it may be intentional. If it is intentional, the FFA must promulgate its own policy and procedure for handling objections to the reduced fee calculation that satisfies the constitutional requirements announced in *Hudson*.

(b) National Education Association

The NEA rebate procedure is also deficient under *Hudson* in several respects. This procedure is contained in plaintiffs' exhibit 1 and is discussed in note 5, *supra*. The most obvious flaw is that the method for determining the reduced fee or "rebate" amount is based upon an acknowledgement of nonchargeable, political activity rather than a justification of the chargeable activity and expenditures. If the information disclosed is otherwise adequate, the NEA's procedure for making that disclosure, set forth in § III of exhibit 1, is sufficient to pass constitutional muster. I would again require, however, that the NEA either forego collection of service fees from nonmembers until the objection time has passed or deposit such funds into an independently controlled, interest bearing escrow account for said time.

Furthermore, the NEA procedure does not provide for a reasonably prompt decision on the validity of the reduced fee calculation by an independent decisionmaker. In fact, no challenge is allowed under the procedure until after the end of the relevant fiscal year when the "final political activity rebate" figure is determined based on actual expenditures. As in *Hudson*, even a 100% escrow of the service fee will not justify this delay. The NEA must provide for an opportunity to challenge the advance reduction of dues, under the preliminary calculation, during the fiscal year in question. Once again, *Hudson* requires that anything short of a 100% escrow during this

time must be independently verified by an audit of a certified public accountant.

I also hold that the NEA's requirement that the independent arbitrator be bound by the union's definition of "political activity" contravenes constitutional requirements. The independent decisionmaker must be free to apply differing standards of chargeability as required by current law. The union cannot bind that decisionmaker to its own definition or standards in any way.

Finally, I note that § VII.E. of exhibit 1 provides that a nonmember employee who challenges the reduced fee calculations of both the NEA and a state affiliate such as the MEA may request that both challenges be processed by the state affiliate under its procedure. By the terms of this section, the NEA retains the discretion to affirm or deny such a request. Assuming that the state affiliate's procedure meets the *Hudson* requirements, granting such a request would certainly satisfy the NEA's burden of providing constitutionally sufficient challenging procedures.

C. Remedy

In accordance with the foregoing discussion in part II.A. of this opinion and the relevant findings of fact, I hold that the union defendants are entitled to the following amounts from plaintiffs James P. Lehnert, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas and John R. Schauble, for agency shop service fees for 1981-1982, together with any interest earned on said amounts: FFA, $20.99; MEA, $7.18, NEA, $1.32. Said plaintiffs are entitled to restitution of the remainder of the reduced fee for 1981-1982 that is currently in escrow, in the amount of $186.41, together with any interest earned on said amount.

This judgment applies only to the service fee for the 1981-1982 fiscal year. The parties, however, filed a stipulation with the court on August 1, 1986, which details a mutually acceptable mechanism for determining the service fees due to the unions from plaintiffs for the four fiscal years subsequent to 1981-1982. This mechanism is based on the final chargeable percentages determined by the court in this case. In review, those percentages are: FFA, 81%; MEA, 3.4%; NEA, 2.75%.

In accordance with the foregoing discussion in part II.B. of this opinion and the relevant findings of fact, I hold that the procedures established by the union defendants for calculating the appropriate agency shop service fee for 1981-1982, and the procedures for challenging the calculation, were constitutionally inadequate under the newly announced *Hudson* standard. However, I find that plaintiffs were not damaged by these procedures, either in 1981-1982 or years subsequent, to any greater extent than the amount of the wrongfully assessed service fee.

Plaintiffs are required by law to contribute to the unions an agency shop service fee of whatever amount the unions can legally establish is chargeable. That amount has been determined by the court for 1981-1982 and the parties have stipulated to a method for calculating that amount for the four subsequent fiscal years. The "retroactive injunction" requested by plaintiffs based on the procedural inadequacies would effectively relieve them of their legal obligation to contribute to the support of the recognized exclusive representative. Such a "retroactive injunction" would not, in my opinion, redress the nature of the theoretical injury, to wit: the denial of the plaintiffs' first amendment interests in proper procedures. Therefore, this type of equitable relief would be inappropriate.

To the extent that plaintiffs have been injured, they are entitled to and will receive adequate compensatory damages. Plaintiffs are not entitled to damages for the value or importance of their first amendment interests in

proper procedures as a supplement to compensatory damages. *Memphis Community School District v. Stachura*, ___ U.S. ____, ____ - ____, 106 S.Ct. 2537, 2545-46, 91 L.Ed.2d 249, 261-62 (1986).

Of course, plaintiffs are entitled to a prospective injunction restraining the nonunion defendants from deducting any service fees from their paychecks until such time as the union defendants establish that they have adopted procedures that comply with the requirements of *Hudson*. These requirements are adequately explained above. With respect to the MEA and FFA, some amendment of their revised policies and procedures set forth in note 7, *supra*, is probably required. As to the NEA, significant amendment to their procedure contained in plaintiffs' exhibit 1 is required to bring it into compliance with the constitutional standard. As a partial alternative, the NEA may establish by affidavit or otherwise that future objections by plaintiffs will be processed through constitutional procedures adopted by the MEA. The court will retain jurisdiction in this case for the sole purpose of determining if and when the union defendants have adopted constitutional procedures. At that time, the court's injunction will be dissolved.

JUDGMENT ORDER

In accordance with the written opinion filed this date, and for the reasons stated therein;

IT IS HEREBY ORDERED that judgment shall enter in favor of each of the following plaintiffs, James P. Lehnert, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas and John R. Schauble in the amount of $186.41, together with any interest accrued on this amount. This judgment shall be satisfied out of the escrow account established by the parties.

IT IS FURTHER ORDERED that the union defendants are entitled to the following amounts from each of said plaintiffs in satisfaction of plaintiffs' service fee obligations for the 1981-1982 fiscal year: FFA, $20.09; MEA, $7.18; NEA, $1.32, together with any interest accrued on these amounts.

IT IS FURTHER ORDERED that plaintiffs' service fee obligations for the four fiscal years subsequent to 1981-1982 shall be calculated in accordance with the stipulation filed with the court on August 1, 1986.

IT IS FURTHER ORDERED that the nonunion defendants are enjoined from deducting any future service fees from plaintiffs' salaries until further order of the court.

APPENDIX A

Direct Costs

Bargaining team salaries	$2,500.00
Bargaining team expenses	249.45
Bargaining team benefits	72.79
Bargaining—secretarial	28.88
Bargaining—miscellaneous	86.79
Contract ratification expenses	112.15
Negotiations training workshop	687.02
Arbitration fees	1,051.69
Crisis Center/Strike Headquarters*	
— rent	2,780.00
— insurance	91.00
— utilities	80.22
— telephone	632.45
— equipment	40.12

APPENDIX A—Continued

Direct Costs	
— petty cash fund	$197.25
Picketing—food	219.05
Picketing—mailing	26.60
Newspaper & radio advertising	446.10
Signs, posters, buttons	141.21
Rent—membership meetings	150.00
Loan to another association	2,500.00
Lobbying state legislature	55.89
MEA legislative dinner	46.80
Preserve Public Education Conference	149.99
13E Coordinating Council	666.42
MEA Representative Assembly	490.45
NEA Representative Assembly	536.39
Sub-total	14,038.71
Administrative	
Computer	4,137.15
Supplies	43.34
Mailing Permit	69.97
Executive Board expenses	44.46
Photocopying	3.60
Sub-total	4,298.52
Total FFA Expenditures 1981-1982	$18,337.23

*Plaintiffs and defendant unions disagree as to the use of this headquarters. Plaintiffs maintain that it was used to prepare for a possible strike, but defendant unions contend that it was a "Crisis Center."

APPENDIX B

Analysis Summary of Teachers' Voice
Volume 59

Category	Column Inches Total	Column Inches Chargeable
Collective Bargaining	779	779
Lobbying	1895.5	1816
Electoral Politics	1167	847.5
Ideological	508.5	0
Public Relations	405	405
Litigation	97	79
Strikes	143.5	0
Administrative	637.5	627
Newsletter Basics	—	proportional
Other Material	1977	1657.5
TOTAL	7610	6211

$$\frac{6211}{7610} = 81.6\%$$

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN DENYING MOTION FOR A PARTIAL NEW TRIAL AND TO ALTER AND AMEND JUDGMENT

June 17, 1987

James P. LEHNERT, Elmer S. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman, Plaintiffs,

v.

The FERRIS FACULTY ASSOCIATION—MEA-NEA, Michigan Education Association, National Education Association of the United States, The Board of Control of Ferris State College, S. Eugene Bychinsky, Robert L. Ewigleben, Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, Defendants.

File No. G 87-346 CA1.

United States District Court
W.D. Michigan.

June 17, 1987.

OPINION

ENSLEN, District Judge.

In 1978 plaintiffs filed their complaint alleging violations of 42 U.S.C. §§ 1983, 1985 and 1986. Plaintiffs alleged that they were required by state law to pay to defendants Ferry Faculty Association ("Unions") an agency shop fee in lieu of Union dues and that this fee was not applied by the Unions exclusively to purposes germane to their duties as collective bargaining representative for the bargaining unit. Plaintiffs sought both damages and injunctive relief against the Unions.

The matter was tried before this Court in January and April of 1986. The Court heard the testimony of twelve

(12) witnesses and accepted more than ninety (90) exhibits during the trial. On August 25, 1986, this Court issued an opinion pursuant to Rule 52(a) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.), 643 F.Supp. 1306. The matter is presently before the Court on defendant Unions' motion for a partial new trial and to alter or amend judgment.

Defendants correctly point out that this Court found that in determining what Union activities were chargeable to agency shop fee payors the Court required that the defendant Unions prove actual, quantified chargeable costs. The Court further found that the burden was on defendants to do so except to the extent indicated in the Court's previous opinion. *See Lehnert v. Ferris Faculty Association—MEA-NEA*, 643 F.Supp. 1306, 1327-1330 (W.D.Mich. 1986).

Defendants argue that "under the circumstances as they unfolded at trial, including the Supreme Court's decision in *Hudson* which was issued after the Unions had offered the vast majority of their testimony, . . . it would be equitable for this Court to exercise its discretion and allow the Defendants the opportunity to supplement the record and provide the Court with the additional information it interpreted *Hudson* to require concerning actual expenditures." *See* Defendants' Brief in Support of Motion for Partial New Trial and to Alter or Amend Judgment at 4-5.

The defendants, in essence, ask this Court to "supplement" the record so that it can provide the Court with the evidence it found lacking in their proofs. Defendants further argue that the record already has established evidence of both the chargeable and nonchargeable activities of their organizations. Here the defendants are asking the Court to again review the testimony of Warren Culver, Robert Marshall and

Catherine Anderson. In addition, defendants request that Catherine Anderson be allowed to offer testimony on the actual expenditures as identified in Exhibit 630. The Court did not mention Exhibit 630 in its earlier opinion, and defendants maintain that "[t]he actual expenditure figures in Exhibit 630 should allow the Court to determine an appropriate chargeable amount." Defendants' Brief, *supra*, at 4.

Plaintiffs respond that the Court did not limit the Unions' presentation of evidence, but rather that the Unions consciously chose to limit their case to budget figures and estimates of time even though the plaintiffs asserted before and during trial that under the current state of the law defendants were required to prove chargeable costs from evidence of actual expenditures and contemporaneous time records. *See* Plaintiffs' Reply to Motion for Partial New Trial and to Alter or Amend Judgment at 1. Plaintiffs further point out that the nature of the Unions' burden of proof was stated as an issue in the pretrial order of January 14, 1985. (See Pretrial Order at 20-23). Moreover, plaintiffs argue that *Hudson* was issued on March 4, 1986, almost two months before the trial resumed on April 23, 1986 and, in any event, defendants could have asked for a continuance but chose, as a matter of trial strategy, not to do so.

The Court agrees with the plaintiffs that under the circumstances of this case it would be unfair to them at this point to allow defendant Unions a second chance to provide evidence concerning their actual expenditures. Further, the Court believes that it would be a waste of its resources. The Court believes its judgment was and is consistent with the law. Even assuming, *arguendo*, that *Hudson* was a "change in the law," there is nothing that indicates that under these factual circumstances it should not be applied retroactively. Moreover, the Court finds defendants' reliance on *Bridgeport Spaulding Community*

Schools, Nos. C79 J-353, CU79 J-51 (Feb. 24, 1986) unpersuasive. *Bridgeport* is a decision by a state administrative law judge with respect to a federal constitutional issue, and as such, it is of little assistance to this federal court.

Finally, the Court finds plaintiffs' reliance on *duPont v. United States*, 385 F.2d 780 (3d Cir.1967) misplaced. The trial court in *duPont* found a failure of proof with respect to a ground which was not raised by defendant at trial, but rather was raised for the first time by the court itself. This case more closely resembles *Bell Telephone Laboratories, Inc. v. Hughes Aircraft Co.*, 73 F.R.D. 16, 20 (D.Del.1976), *aff'd* 564 F.2d 654 (3d Cir.1977), *cert. denied*, 435 U.S. 924, 98 S.Ct. 1489, 55 L.Ed.2d 518 (1978). The *Bell* court noted that "a party cannot request relief from the court for its own errors in judgment, when the strategy of litigation was based on conscious and informed choices." *Bell*, 73 F.R.D. at 22. *See also Rue v. Feuz Construction Co.*, 103 F.Supp. 499, 502 (D.D.C.1952).

Plaintiffs emphasize, and the Court agrees, that because defendant Unions have failed to maintain contemporaneous hard data, reopening the case will essentially be a waste of time and would be unfair to plaintiffs.

Defendants assert that Exhibit 630 contains actual expenditures from which the Court should be able to determine an appropriate chargeable amount. Here defendants are arguing that because the Court found 81% of the *Teacher's Voice* activities to be chargeable, the Court should be able to determine an appropriate chargeable figure for staff costs associated with the *Teacher's Voice*. The defendants are apparently suggesting that the Court simply conclude and calculate that 81% of the line expenditure for staff costs in Exhibit 31 are chargeable.

Plaintiffs point out that while the Court did conclude that 81% of the contents of the *Teacher's Voice* was chargeable in 1981-82, that fact alone does not allow the Court to determine an appropriate chargeable figure for staff costs associated with the *Teacher's Voice* because the staff who published the newspaper had other duties—some of which, at least, are *nonchargeable*. *See e.g.*, Plaintiffs' Exhibit 612, 9/7/81 at 4 *with* Plaintiffs' Exhibit 79 *and* Plaintiffs' Exhibit 615 at 11 *and* Defendants' Exhibit G at 3, ¶ 9 (Elwood Landis, editor of *Teacher's Voice*, was staff representative to the Distinguished Service Awards Committee; the MEA conceded that its awards program "was arguably non-chargeable," and the report of the committee in question shows no relationship to bargaining). *See* Plaintiffs' Brief, *supra*, at 5.

Moreover, Exhibit 630 to some extent incorporates estimates of nonchargeable time. *See* especially testimony of Irving B. Ross, C.P.A. indicating that Exhibit 630 did not change his professional opinion that the Unions' reduced fee calculations could not be relied upon because of the use of estimates and budgeted amounts.

The Court admits that the Audited Balances column of 8/31/82 in Exhibit 630 appears to satisfy, at least, Mr. Ross's objections. Still, as the Court has already indicated, even recalling Catherine Anderson would not establish the contemporaneous records that the Court finds necessary in this instance to meet the defendants' burden of proving chargeable time. Ms. Anderson was not an employee of MEA until September 1982, i.e., *after* the fiscal year in question. The Court believes that the additional evidence which defendants propose to offer would involve more of the same speculations and "soft data" which it has previously rejected.

Similarly, the Court rejects defendant Unions' contention that the record contains evidence that 100% of

the time of the higher education consultant, the retirement consultant, and the research consultants is spent on chargeable activities. *See e.g.,* Transcript of Marshall Testimony at 115 (Jan. 15, 1986) (higher education consultant involved in organizing in 1981-82); Plaintiffs' Exhibit 73 at F-4 (retirement consultant involved in lobbying and political action); Plaintiffs' Exhibit 616, 1/5/82 at 5, 3/15/82 (research staff involved in lobbying, political surveys, and organizing). *See* Plaintiffs' Brief, *supra*, at 4.

Finally, with respect to the question of UniServ staff time, the testimony of Warren Culver and Robert Marshall were *ex post facto* estimates—and again there was no contemporaneous hard data which would satisfy MEA's burden of proof.

Accordingly, for all the reasons cited above, the Court finds no reason to open the record and/or to grant a partial new trial and will enter an order denying defendants' motion for a partial new trial and to alter or amend judgment.

APPENDIX D

JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

June 17, 1987

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JAMES P. LEHNERT, ELMER S. JUNKER, JAMES E. LINDSEY, SAM C. PETICOLAS, JOHN R. SCHAUBLE, and THEODORE D. SPEERMAN,

Plaintiffs,

87 JUN 17
CLERK, U.S. DIST. COURT
WESTERN DIST. OF MICH.
BY ra

v

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, MICHIGAN EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, THE BOARD OF CONTROL OF FERRIS STATE COLLEGE, S. EUGENE BYCHINSKY, ROBERT L. EWIGLEBEN, EARL D. GABRIEL, ROBERT P. GERHOLZ, FRAN HARRIS, DELBERT D. LONG, ROBERT C. REDMAN, THOMAS P. SCHOLLER, PATRICIA M. SHORT, and STEVEN L. THOMAS,

File No. G 78-346 CA1

Defendants.

_____/

JUDGMENT ORDER

In accordance with the opinion entered June 15, 1987;

IT IS HEREBY ORDERED that defendants' motion for partial new trial and to alter or amend judgment is DENIED.

DATED in Kalamazoo, MI: /s/
RICHARD A. ENSLEN
U.S. District Judge

June 15, 1987

APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

September 19, 1989

NO. 87-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES P. LEHNERT, ET AL.,	:	
	:	
Plaintiffs-Appellants	:	FILED
	:	SEP 19 1989
vs.	:	LEONARD GREEN, CLERK
	:	
THE FERRIS FACULTY ASSOCIATION, ET AL,	:	ORDER
	:	
Defendants-Appellees	:	
	:	
THE BOARD OF CONTROL OF FERRIS STATE COLLEGE, ET AL.,	:	
	:	
Defendants	:	

Upon consideration of the motion of the appellants for leave to file their petition for rehearing one day out of time,

It is **ORDERED** that the motion be, and it hereby is, **granted**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/

APPENDIX F

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING

November 7, 1989

NO. 87-1700

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES P. LEHNERT, ET AL.,	:	
	:	
Plaintiffs-Appellants,	:	FILED
	:	NOV 7 1989
v.	:	LEONARD GREEN,
	:	CLERK
THE FERRIS FACULTY	:	
ASSOC., ET AL.,	:	ORDER
	:	
Defendants-Appellees,	:	
	:	
THE BOARD OF CONTROL OF	:	
FERRIS STATE COLLEGE,	:	
ET AL.,	:	
	:	
Defendants	:	

BEFORE: MERRITT, Chief Judge; MARTIN and MILBURN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX G

RELEVANT PARTS OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT, MICH. COMP. LAWS §§ 423.201-.216

Relevant Parts of the
Michigan Public Employment Relations
Act, Mich. Comp. Laws §§ 423.201-.216

423.202 Public employee; definition; strike prohibited.

Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

423.210 Prohibited conduct; service fee.

Sec. 10. (1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * * .

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive

bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

423.211 Public employees: designation of bargaining representatives; grievances of individual employees.

Sec. 11. Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

423.215 Collective bargaining; duties of employer and employees' representative; subjects and limitations.

Sec. 15. A public employer shall bargain collectively with the representatives of its employees as defined in section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement

reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

APPENDIX H

RELEVANT PART OF MICHIGAN COMPILED LAWS § 408.477

Relevant Part of Michigan Compiled Laws § 408.477

408.477 Deductions from wages.

Sec. 7. With the exception of those deductions required or expressly permitted by law or by a collective bargaining agreement, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. * * *